July 12, 2021

First Supplement to Memorandum 2021-11

Sentencing Practices in California and Related Matters Generally Panelist Materials

Memorandum 2021-11 gave an overview of various sentencing practices and theories, including a description of California's history and comparisons to other states. This supplement presents and summarizes written submissions from panelists scheduled to appear before the Committee on July 13, 2021.

Exhibit

California and National Sentencing History

California Board of Parole Hearings

Sentencing in Other States

Custodial Sentences and Community Reentry

Discussion Panel 1
California and National Sentencing History

Justice J. Anthony Kline, California First District Court of Appeal

In addition to his current position as an appellate judge, Justice Kline was Governor Jerry Brown's Legal Affairs Secretary from 1975 to 1980, during the time when the Determinate Sentencing Law was enacted.

Justice Kline's submission describes what he sees as a major problem with how the California Board of Parole Hearing operates and how this may be leading to people serving disproportionate sentences. In Justice Kline's view, the parole board should, early in someone's prison term, set maximum limits on incarceration for people who receive indeterminate life terms and should not rely on scientifically unsupported determinations of dangerousness when making parole board decisions.

The submission describes the history that led to the current state of affairs. It details California Supreme Court decisions in the 1970s about California's indeterminate sentencing system that informed the creation of the Determinate Sentencing Law, including the Court's requirement from *In re Rodriguez*, 14 Cal. 3d 639 (1975), that the parole board had to promptly set an incarcerated person's "primary term" — the maximum amount of time someone would spend in prison — in addition to deciding when to release the person within that term. Following recent litigation, the parole board has stopped making these determinations which, according to Justice Kline, prevents courts from reviewing whether someone in prison will serve a term that is constitutionally disproportionate to their offense and can also lead to unjustified disparities in how long people will serve in prison. Justice Kline also notes that decades of research have has shown that predictions of dangerousness (like the ones the parole board makes) are unreliable.

Justice Kline recommends that the Committee set limits on the parole board's discretion to release people by clearly restoring the parole board's duty to fix a primary term soon after someone arrives in prison so that there is an upper limit on punishment. He also suggests that the Committee explore the concept of a "presumptive-maximum parole-release date," which could be set as the time when an incarcerated person has completed a defined number of rehabilitative programs, or has gone a certain amount of time without disciplinary write-ups, or could be based on the minimum parole date, such as 110% of the minimum time served.

Professor Michael Tonry, University of Minnesota Law School

Professor Michael Tonry is the McKnight Presidential Professor in Criminal Law and Policy at the University of Minnesota. His article, *Sentencing in America: 1975–*2025, 42 Crime & Just. 141 (2013), is discussed in the background memo for the July 2021 meeting at pages 15–17, and gives an overview of sentencing practices over the past 50 years. The article can be found here.

Professor John Pfaff, Fordham University School of Law

Professor Pfaff's submission notes that many people in California's prisons who are serving the longest sentences are doing so for violent offenses, including a large percentage who are serving time for homicide offenses. He notes that California holds 8% of the national prison population but 20% of those serving life sentences. Significantly decreasing this population through "back end" mechanisms such as parole release and second-look sentencing presents difficult political issues because any new offenses committed by a person released by one of these mechanisms will result in immediate political pressure on whoever made the release decision. But local prosecutors would not face such political blowback if the initial sentence someone received was shorter because it would still be many years before someone would be released from prison.

Building on this idea, Professor Pfaff suggests that California law should have more mechanisms that incentivize prosecutorial leniency. Specifically, California law could require prosecutors to report how many prison years they have requested at sentencing hearings each year (including the associated cost to the state), adjust the Three Strikes law to give prosecutors more discretion to avoid charging prior strikes, and reward prosecutors or their counties with financial incentives if they cut the number of prison-years they have used in the past.

Presentation by Jennifer Shaffer

Jennifer Shaffer, Executive Officer, California Board of Parole Hearings

Ms. Shaffer's submission details the nonviolent parole review process created by Proposition 57, including its "paper review" process. The submission includes detailed statistical information on the number of people currently eligible for Prop 57 review, their conviction offense, length of sentence, time from admission to prison to their Prop 57 review, as well as the difference in time between their possible Prop 57 review date and their natural release date. (This data is on pages

12–14.) The submission also provides this information for people not currently eligible for review because they are convicted of a violent offense. (This data is on pages 14–18.)

Discussion Panel 2
Sentencing in Other States

Marshall Thompson, Utah Board of Pardons and Parole

Marshall Thompson is Vice-Chair of the Utah Board of Pardons and Parole, and former Director of the Utah Sentencing Commission. His submission explains that in the last six years Utah has reduced its prison population to its 2003 level without any measurable detriment to public safety. According to Mr. Thompson, the best part of Utah's indeterminate system is that sentence length is largely determined by a person's behavior in prison, risk factors, and engagement in treatment. But the lack of certainty about the release date is a great drawback. To mitigate this, Utah uses robust sentencing guidelines to guide the scheduling on Board hearings and help drive their analysis. Mr. Thompson explains that Utah does not generally track parole grant rates, but it is the parole board's policy to always grant parole unless there are extraordinary circumstances. In fiscal year 2019, 92.3% of people who terminated their sentences were paroled or terminated prior to the statutory maximum sentence.

Barbara Levine, Citizens Alliance on Prisons and Public Spending (Michigan)

Barbara Levine is the former Executive Director, of the Michigan Citizens Alliance on Prisons and Public Spending and a former Commissioner on the Michigan Criminal Justice Policy Commission. Her submission describes sentencing and parole practices in Michigan and gives an overview of the development of those practices over time. She describes Michigan's indeterminate sentencing and parole system as an "archetype of what state criminal justice systems used to be like." She gives an overview of what led the state to adopt sentencing guidelines — disparity, lack of accountability and the diffusion of authority over the actual sentence to be served among prosecutors, judges and parole boards — and explains the basics of how the guidelines are used."

Ms. Levine also discusses changes to the parole decision-making process, including the adoption of parole guidelines, and analyzes the most recent parole

grant rates. According to Ms. Levine, policy choices made in the 1990s altered the sentencing guidelines in a way that has led to extremely long sentences and contributed to disparity. Among other changes, ad hoc legislative amendments of the penal code and of the guidelines have increased sentences and allowed for extremely broad sentencing ranges that increase disparity. Ms. Levine concludes that thoughtful policy choices about fundamental issues like the use of criminal history enhancements are more important than the sentencing scheme."

Discussion Panel 3
Custodial Sentences and Community Reentry

Susan Burton, A New Way of Life

Susan Burton is the founder and President of A New Way of Life Reentry Project (ANWOL) in Los Angeles, California. Her submission describes the services provided to women transitioning out of prisons and jails at ANWOL. Ms. Burton highlights that her own history of incarceration and substance abuse was fueled by grief, trauma, and a lack of support. Now, as President of ANWOL, Ms. Burton seeks to help formerly incarcerated women belong, heal, and become leaders in their communities. Ms. Burton explains that it is important for reentry programs to provide a less restrictive and more autonomous environment than the one in prison.

Doug Bond, Amity Foundation

Doug Bond is the Chief Executive Officer at Amity Foundation, a non-profit organization that serves people affected by recidivism, crime, homelessness, and addiction. Mr. Bond asserts that recidivism can be reduced through greater use of the existing CDCR residential reentry program. Mr. Bond highlights that recidivism rates for those who participate in the program are better than the rates of all other released from prison. According to Mr. Bond, virtually all people who are released from prison should receive intensive, gradual, and community-based reentry support.

Matthew Cate, Cate Consulting

Matthew Cate is the President of Cate Consulting, former Secretary of CDCR, and former Executive Director of the California State Association of

Counties. His submission is a recent whitepaper that describes the need for and benefit of expanded reentry programming. Mr. Cate highlights that California's prisons are overcrowded, outdated and extremely expensive. The result of these shortcomings is that people released from prison are not prepared for successful reentry into their communities. Reentry programs lead to better outcomes by connecting those transitioning out of prisons with employment opportunities, housing, and medical/behavioral treatment. Reentry programs have also been shown to decrease recidivism. Mr. Cate identifies several improvements that should be made to the existing reentry model.

Respectfully submitted,

Thomas M. Nosewicz
Legal Director

Rick Owen
Staff Counsel

Lara Hoffman
Fellow, Stanford Law School

Exhibit A

Justice Anthony Kline

M E M O R A N D U M

TO : Michael Romano, Chairperson
Committee on Revision of the Penal Code, and
All Members of the Committee
FROM: J. Anthony Kline
DATE: July 1, 2021
RE: Legislation Compelling the Parole Board to Consider During the Parole Process Whether Denial of Parole May Result in Disproportionate Punishment and to Corroborate its Predictions of Dangerousness

The parole process administered by the Board of Parole Hearings (Board), recently ceased considering whether denial of parole to indeterminately sentenced life prisoners might result in constitutionally excessive punishment. The sole factor now determining whether a parole eligible life prisoner will be found suitable for release is the Board's uncorroborated prediction whether the inmate remains dangerous.

This highly unreliable practice enables the imposition of disproportionate punishment, undermines judicial review of claims of constitutionally excessive punishment, exacerbates prison overcrowding, and countenances racial and ethnic bias in the parole process.

This memo has two parts. The first describes the largely unknown history that led to the present predicament - how the evaluation of culpability and proportionality were incorporated into the parole process in the past, and how California parole boards and the Department of Justice have eroded and ultimately emasculated that policy and practice. The second part, which commences at page 22, describes the ways in which the Legislature can rectify the unreliability of its predictions of dangerousness and integrate consideration of constitutional proportionality into the parole process.

I.

Culpability as the Measure of the Proportionality of Punishment

The concept of disproportionality refers to the fact that because no offense is always committed under the same circumstances and in the same manner, "rational gradations of culpability" can be made for a given commitment offense. (*In re Lynch,* (1972), 8 Cal.3d 410 at p. 426 (*Lynch*); *In re Foss* (1973) 10 Cal.2d 910, 919 (*Foss*).) Accordingly, the first of the three distinct techniques specified in *Lynch* to be used in determining whether a punishment is proportionate to the offense – examination of the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" - involves an assessment of the "rational gradations of culpability that can be made on the basis of the injury to the victim or to society in general." (*Foss***,** at p. 919.)

In the context of the Indeterminate Sentencing Law (ISL), *People v. Wingo* (1975) 14 Cal.3d 169 (*Wingo*) held "that when a defendant serving an indeterminate sentence encompassing a wide range of conduct challenges the statute as imposing cruel or unusual punishment, judicial review must await an initial determination by the Adult Authority [then the parole board] of the proper term in the individual case. When the term is fixed a court can then analyze the constitutionality of the statute as applied." (*Id*. at p. 183.)

Immediately after *Wingo* was decided, the high court issued the seminal opinion in *In re Rodriguez* (1975) 14 Cal.3d 639 (*Rodriguez*), which held that the ISL was not "being administered in a manner which offers assurance that persons subject thereto will have their terms fixed at a number of years proportionate to their individual culpability (*People v. Wingo, supra, ante*, p. 169), or, that their terms will be fixed with sufficient promptness to permit any requested review of their proportionality to be accomplished before the affected individuals have been imprisoned beyond the constitutionally permitted term." (*Rodriguez,* at p. 650.) *Rodriguez* directed the parole board to address these issues by promptly fixing an indeterminately sentenced inmate's "primary term" –

the maximum term that is not "disproportionate to the individual prisoner's offense." (*Rodriguez*, at p. 652, 653, fn. 18.)

The parole board adopted regulations implementing *Rodriguez,* pursuant to which an offender's culpability was measured by means of a "base term" reflecting the circumstances of the crime, which together with adjustments for the offender's criminal history comprised the "primary term." California parole boards began calculating base terms under the ISL and continued doing so under the Determinate Sentence Law (DSL) for life prisoners eligible for parole who served indeterminate sentences under the new law. Over the years, parole boards applied the base term in different ways and sometimes for different purposes. But the Board stopped using base terms altogether three years ago, after the California Supreme Court in *In re Butler* (2018) 4 Cal.5th 728 (*Butler*) declared base terms "unnecessary."

The Nature of the Present Problem

Our Supreme Court repeatedly states that "no person" - including indeterminately sentenced life prisoners eligible for parole -- "can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense; and no statute can 'authorize the retention of an inmate beyond the constitutionally maximum period of confinement period. . . *[e]ven for reasons of public safety*. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1096, italics added), citing *Rodriguez, supra,* 14 Cal.3d at pp. 646-656; accord, *In re Butler, supra,* 4 Cal.5th 728, 744).)

The Board ignores this principle. Under its regulations, "[*r*]*egardless of the length of time served*, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison" (tit. 15 Cal. Code Regs, § 2402, italics added.) From the Board's perspective, the prediction of dangerousness trumps the constitutional prohibition on cruel and/or unusual punishment.

Recently, in *In re Palmer* (2021) 10 Cal.5th 959, the Supreme Court emphasized that "[f]or well over four decades, we have consistently recognized that life-top inmates denied release on parole may bring their constitutional challenges directly to court. And

when inmates do bring such claims, they are not limited to challenging only the statutory life maximum, as the Attorney General suggests." (*Id*. at p. 789) This celebration of the judicial remedy available to life prisoners is ironic, as *Palmer* is the first case in which the Supreme Court has actually addressed a life prisoner's claim of constitutionally excessive punishment since the decision in *Rodriguez* forty-six years ago. Unlike the abundant number of habeas petitions claiming that no evidence supports a determination an inmate is unsuitable for release, petitions advancing constitutional claims, which are far more complex, are few and far between.

The cruel and/or unusual punishment provisions are underenforced with respect to life prisoners eligible for parole in part because lifers denied parole have no right to counsel. Neither county public defenders, the Office of the State Public Defender, nor any other group of lawyers represent life prisoners after they have been denied parole; lifers have essentially been abandoned by the criminal defense bar. It is theoretically true, as the Supreme Court often points out, that inmates can challenge the constitutionality of their punishment by filing a habeas corpus petition in propria persona. But doing so effectively is too much to expect of an unrepresented life prisoner: The *Lynch* test requires both an "examination of the nature of the offense and/or offender" and danger posed by each (*Lynch, supra*, 8 Cal.3d at p. 425) and a comparison of the challenged punishment with that applicable to similar offenses in California and to the same offense in other jurisdictions, showings requiring legal skills and resources ordinarily unavailable to lifers. It is telling that the petitioner in *Palmer* was represented by nine partners and associates of O'Melveny & Myers, which also represented him in the court that found the denial of parole resulted in unconstitutional punishment. Life prisoners rarely enjoy such extravagant legal assistance.

But the lack of legal assistance is not the only or even the biggest problem.

The principle of proportionality in punishment is difficult to enforce with respect to indeterminately sentenced lifers largely because the punishment they receive is not specified by the Legislature, imposed by a judge, or fixed by the parole board or any other authority until the inmate is released - which may be never.

As *Lynch, Foss, Wingo*, and *Rodriguez* all indicate, a reviewing court cannot easily assess the proportionality of punishment if it is unspecified and no assessment has been made of the circumstances of the commitment offense and the inmate's individual culpability. Numerous studies have shown that the reason "prisoners incarcerated under indeterminate sentence laws serve longer terms of imprisonment than prisoners convicted of comparable crimes in jurisdictions using relatively fixed sentences" is "the structure of indeterminate sentencing." (Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm* (1974) 123 U. Pa. L. Rev 297, 303 and authorities there cited; accord, Morris, *The Future of Imprisonment* (Univ. Chicago Press 1974), Von Hirsch, *Doing Justice: The Choice of Punishment* (Hill & Wang 1976.)

The parole board justifies its disinterest in the culpability of lifers by denying there is such a thing as constitutionally excessive punishment for such prisoners so long as the Board deems them unrehabilitated. This position was supported by California courts during most of the time the ISL was in effect. For example, in *People v. Wade* (1968) 266 Cal.App.2d 918, the court explained that "the indeterminate sentence is in legal effect a sentence for the maximum term [citation]," and the purpose of the ISL "is to mitigate the punishment which would otherwise be imposed on the offender," "plac[ing] emphasis on the reformation of the offender" and "seek[ing] to make the punishment fit the criminal rather than the crime." (*Id*. at p. 928.) For these reasons, the court said, it was unable "to see how the indeterminate sentence law, which affords a person convicted of crime the opportunity to minimize the term of imprisonment by rehabilitating himself in such manner that he may again become a useful member of society, can be held to constitute the infliction of cruel and unusual punishment." (*Ibid*.) According to the *Wade* court, challenging application of the law "on the ground that it violates the constitutional rights of the defendant would constitute a step backwards in the treatment and rehabilitation of those convicted of crime." (*Id*. at p. 929.)

Such reasoning was repudiated by the California Supreme Court in 1972, when *Lynch* imposed constitutional considerations of proportionality on confinement whose purpose is rehabilitative. In 1975, when the ISL was still in effect, our Supreme Court

acknowledged in *Rodriguez* that the failure of the parole board to assess culpability and promote proportionality in the punishment imposed on indeterminately sentenced prisoners was no longer judicially tolerable.

The Rationale of Rodriguez and its Subsequent Administrative Defeat

In requiring the Board to fix inmates' primary (constitutionally maximum) term immediately after they entered prison, based on assessment of individual culpability for the commitment offense, *Rodriguez* explained that the Board's "term-fixing responsibility" was independent of its power to grant parole and its discretionary power to later reduce the primary term on the basis of the prisoner's "good conduct in prison, his effort toward rehabilitation, and his readiness to lead a crime-free life in society," or "to retain the prisoner for the full primary term if his release might pose a danger to society." (*Ibid*.) The court made clear a critical distinction between the Board's term-fixing and parole-granting functions: While the considerations regarding decisions to reduce a term or retain a prisoner for the full primary term "are based in large measure on occurrences subsequent to the commission of the offense," the primary term "must reflect the circumstances existing at the time of the offense." (*Id.* at p. 652.)

Rodriguez identified several purposes for the requirement of prompt fixing of the primary term shortly after a person entered prison. One was to ensure administrative application of the *Lynch* test of proportionality and "prevent the intrusion of irrelevant, post-conviction factors into the determination of the punishment that is proportionate to the offense of the particular inmate" – because culpability for the commitment offense is based only on the circumstances of the offense and the manner in which it was committed, which are immutable factors. (*Id.* at pp. 652-653, 654, fn. 18.) Another was to relieve the anxieties of prisoners, whose rehabilitation was undermined by their lack of knowledge as to when, if ever, they would be released. Facilitation of judicial review was also an important purpose, (*Id.* at p. 654, fn. 18.) As the court explained at length, prompt fixing of the primary term by the parole board was also essential "to relieve courts of the burden of contending with inadequate petitions unaccompanied by necessary supporting data inmates might lack the ability the obtain and present." (*Ibid.*)

"Once the primary term is fixed by the Authority," the court stated, "all of the relevant data regarding the particular inmate, the circumstance of his offense, and the criteria upon which the term is based will have been marshalled by the [parole board], thus enabling [the] petitioner to set out the base or bases for his complaint, while at the same time providing the court with a record adequate to permit meaningful review." (*Id.,* p. 654, fn. 18)*)*

The regulations adopted by the parole authority in response to *Rodriguez* required it to set the "primary term" for a prisoner sentenced to an indeterminate life term and eligible for parole fairly soon after the inmate entered prison[1] (former 15 Cal. Admin. Code, §§ 2000 et seq. [Cal. Admin. Register 76, No. 21–B, May 22, 1976] (1976 Regs.), and defined the primary term as "the maximum period of time which is constitutionally proportionate to the individual's culpability for the crime." (1976 Regs., § 2100, subd. (a).)[2] The primary term consisted of a "base term" reflecting the circumstances of the crime pertinent to the inmate's culpability, and "adjustments for the individual's criminal history" (prior prison terms and current commitments). (*Id.,* § 2150) Thus, the primary term set the maximum term that could be constitutionally imposed based on the particular

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[1] The term setting hearing was to be scheduled, together with the inmate's first parole hearing, for the earlier of one month before his or her minimum eligible parole date or the 12th month after reception (1976 Regs., §§ 2125, subd. (a)(2), 2251); for an inmate whose minimum eligible parole date was within 120 days of arrival in prison, the hearing was to be within 120 days of reception. (1976 Regs., § 2125, subd. (a).)

[2] The original regulations were issued by the Adult Authority on September 2, 1975, two months after *Rodriguez* was decided and prior to publication of the California Code of Regulations. It is entitled "Chairman's Directive No. 75/30 and entitled "*Implementation of In re Rodriguez*." This regulation states that, once fixed the primary term "cannot be refixed upward. A discharge date earlier than the primary term may be fixed, but may be refixed upward to the primary term if the inmate . . . engages in conduct which affords cause to believe he or she would pose a danger to society if free." The regulation states that the purpose of the base term is to "Evaluate the Inmate's Culpability" and enumerates non-exclusive criteria to be used in undertaking that evaluation.

offense and offender, with the base term serving as a direct assessment of an inmate's individual culpability for his or her specific commitment offense. The effect of *Rodriguez* and the implementing regulations was to introduce an element of determinateness into an indeterminate life sentence where the defendant was eligible for parole.

Immediately after the DSL became effective on July 1, 1977, the parole authority, then called the Community Release Board (CRB), published parole regulations for life prisoners which no longer referred to a "primary term." (Former 15 Cal. Admin. Code, §§ 2265–2329 [Register 77, No. 28–B, July–9–77] (1977 Regs.).) However, the CRB continued to require the setting of a base term for prisoners who were still indeterminately sentenced and, in 1978 regulations, adopted a method for doing so that was followed until the *Butler* decision.

For a given life crime, the regulations provided a biaxial matrix specifying a triad of base terms depending on the seriousness of the circumstances in which it was committed.[3] The vertical axis specified categories of pertaining to the relationship between the inmate and his victim (so that, for example, culpability for second degree murder would be mitigated if the victim was a crime partner and aggravated if the victim had little or no personal relationship with the inmate, as well as if the death occurred during commission of another crime) and the horizontal axis specified categories based on the level of violence employed (ranging from death caused accidentally to torture). (The matrix for first degree murder last employed by the Board is attached to this Memo as Appendix A.) Board regulations enumerated 30 additional non-exclusive factors pertaining to culpability that could be used to aggravate (e.g., killing to preclude

[3] The CRB's 1976 regulations did not refer to "base term" but, in what amounted to the same thing, required calculation of a "base period of confinement" which, together with adjustments, would establish the "total period of confinement" upon which a tentative parole date would be set. (1977 Regs., § 2304, subd. (a), 2318-2328.) Regulations published in 1978 returned to use of "base term." (Former 15 Cal. Admin Code, § 2282 [Register 78, No. 31–A, August 5, 1978] (1978 Regs.).)

testimony of witness, lying in wait) or mitigate (e.g., prisoner played minor role, killing during unusual situation unlikely to recur) the middle base term triad. (Former tit. 15 Cal. Code Regs., §§ 2404, 2405.)[4] (The regulations describing the 30 additional factors are set forth in Appendix B.)

But, in critical distinction to *Rodriguez* and the 1976 regulations, beginning with the 1977 regulations, the calculation of the base term was to be made by the CRB only *after* an inmate was found suitable for parole. (*Id.*, § 2304, subd. (a).) This change was enormously consequential, because it eliminated consideration of proportionality during the process of determining suitability for release on parole, when it most mattered.

The reasoning behind abandonment of the requirement that a "primary term," based on a base term measuring the circumstances of the offense and adjustments for the offender's criminal history, be determined early in an inmate's incarceration – including those sentenced to indeterminate terms even under the DSL - may be indicated by the

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[4] For example, the matrix of base terms for second degree murder last suggested by Board regulations (former tit. 15 Cal. Code of Regs., § 2403, subd. (c)) provided that if the victim "was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death," and the "[d]eath was almost immediate or resulted at least partially from contributing factors from the victim; e.g., victim initiated struggle or had goaded the prisoner," the applicable base term triad was 17-18-19 years. If none of the numerous additional mitigating factors (former 15 Cal. Code of Regs., § 2405) or aggravating factors (former 15 Cal. Code of Regs., § 2404) applied, the base term would be 18 years.

The most aggravated base term triad prescribed for by the parole board's matrix for second degree murder, 19-20-21 years, applied when the "[v]ictim had little or no personal relationship with prisoner or motivation for the act resulting in death was related to the accomplishment of another crime (e.g., death of victim during robbery, rape, or other felony," and "[d]eath resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with weapon not resulting in immediate death or actions calculated to induce terror in the victim." (former 15 Cal. Code of Regs., § 2403, subd. (c).) The most mitigated triad of terms, where the victim "died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack, a crime partner actually did the killing," and the victim was an accomplice or otherwise implicated in a criminal act with the prisoner during which or as a result of which the death occurred." (*Ibid.*)

California Attorney General's subsequent explanation of his view that the CRB was no longer required to exercise the term fixing function *Rodriguez* imposed. The Attorney General had created a committee that assessed possible changes to the legal nature of prison sentences made by the DSL and Proposition 7*,* the so-called Death Penalty Act, which was approved by the voters in 1978.[5] In a five-page memo dated July 26, 1979, the committee detailed a list of changes in law it believed resulted from the DSL and/or Proposition 7. The Office of the Attorney General sent the memo to all criminal deputies with a declaration that it "sets out the Attorney General's position statewide."

Among other things, the memo stated that the "primary features" of the parole process under the ISL "passed into history on July 1, 1977, with the coming of DSL. The parole board's power to fix terms was withdrawn by the repeal of [Penal Code] section 2940 et seq., and nothing in the current Penal Code evidences an intent to reestablish those powers for first or second degree murder [which remained indeterminately sentenced]."

The 1979 memo went on to conclude that "In re Rodriguez (1975) 14 Cal.3d 639 also appears to have been rendered obsolete by the changed structure of life sentences. In Rodriguez, the California Supreme Court placed the burden on the parole board to set a prisoner's 'primary term' quickly and without regard to any post-conviction behavior. This 'primary term' established the outer limit of the prison system's jurisdiction over the prisoner. The basis for the Rodriguez decision lay in the judicial branch's obligation to examine terms, as fixed by the parole board, to determine whether they were cruel or unusual. In light of the fact the CRB has no term fixing power, it was the unanimous conclusion of all members present that *Rodriguez* is no longer applicable."

The reasoning of the July 26 Memo is misleading. That the DSL eliminated the parole authority's explicit statutory term-fixing authority with respect to determinately

[5] The Attorney General's eight-person committee was originally charged with assessing state agency compliance with the new due process requirements prescribed by the United States Supreme Court in *Morrissey v. Brewer* (1972) 408 U.S. 471, and it was commonly referred to as the "Morrissey 8 Committee."

sentenced prisoners – and therefore the obligation imposed by *Rodriguez* to fix the constitutionally maximum "primary term" of such prisoners - does not necessarily mean it eliminated the authority's power to consider proportionality during the parole process for *indeterminately* sentenced inmates, whose terms remained fixed by the Board when it grants parole. The purpose of *Rodriguez* was to facilitate enforcement of parole-eligible life prisoners' right to enjoy the benefits of the constitutional prohibition against punishment disproportionate to culpability for the commitment offense, without regard to postconviction conduct. Neither the DSL nor Prop 7 (which changed sentencing for prisoners convicted of murder in the first degree only for those *ineligible* for parole) interfered with the continuing applicability of this aspect of *Rodriguez* to the parole process applicable to inmates eligible for parole whose offenses remained indeterminately sentenced after enactment of the DSL.

The parole regulations implementing *Rodriguez* mandated that the base term be fixed soon after an inmate entered prison primarily to ensure there was an assessment of culpability for the commitment offense, free of post-conviction factors, so constitutional proportionality could be incorporated into the process of determining suitability for parole. True, the base term did not purport to represent the maximum term that could be constitutionally imposed, but it informed the Board, the inmate and, if necessary, a reviewing court whether the denial of parole might result in punishment grossly disproportionate to an inmate's individual culpability. That ceased to be the case when the Board delayed fixing the base term until after the life prisoner was deemed suitable for release, if he or she was ever deemed suitable.

The Board justified its practice of deferring the fixing of the base term on the ground that it promoted uniformity in sentencing by ensuring an inmate found suitable for release was not released earlier than would be indicated by his or her base term. Uniformity in sentencing had not been a goal of the ISL, under which release was based on rehabilitation. The present sentencing goals of the DSL include *both* uniformity *and* proportionality. As stated in the opening paragraph of the DSL, the purpose of incarceration "is best served by terms that are proportionate to the seriousness of the

offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." (§ 1170, subd. (a)(1).) The Board's rationale ignores proportionality presumably because it would cabin its unrestricted right to serially deny parole to persons unreliably predicted to remain dangerous.

Promotion of uniformity did not require deferring the setting of the base term, but postponement served another, undeclared, purpose. Uniformity and proportionality are closely related because, as later discussed, both are based on culpability for the commitment offense. However, while both are sentencing goals of the DSL, proportionality is also constitutionally mandated. Therefore, although the goal of uniformity has been judicially deemed subordinate to the need to promote public safety (*In re Dannenberg, supra,* 34 Cal.4th 1061 at p. 1077-1095),[6] proportionality is not subordinate to public safety but the regnant factor. As the majority opinion in *Dannenberg* also makes clear, a statute "cannot authorize [a parole eligible life prisoner's] retention, *even for reasons of public safety*, beyond this constitutional maximum period of confinement." (*Id*. at p. 1096, italics added.) Postponing calculation of the base term until a prisoner was found suitable for release had the effect of severing the constraint of constitutional proportionality from the determination of suitability.

In re Butler and the Demise of the Base Term.

In 2013, Roy Butler, a parole eligible lifer, challenged the board's deferral of the fixing of a prisoners base term, claiming it "effectively eliminated any meaningful consideration of proportionality in sentencing during the most crucial portion of the parole process, and therefore facilitated imposition of constitutionally excessive punishment." (*In re Butler* (2015) 236 Cal.App.4th 1222, 1227.) As the case came before

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[6] *Dannenberg* was a split decision. Justice Moreno's dissent, which was joined by Justices Kennard and Werdegar, persuasively makes the case that the parole board failed to comply with statutory and constitutional mandates for prisoners to obtain parole according to a uniform, proportional system designed by the board. That is, in my view, still the case.

a Court of Appeal panel of which I was a member, the central dispute was the role of the base term.

The parole board took the position that the sole purpose of the base term was to promote uniformity in sentencing by ensuring an inmate who had reached his minimum eligible parole date and been found suitable for release had *also* served the minimum term prescribed by his or her base term.

Although Butler did not dispute the role of the base term with regard to uniformity he contended that, because it consisted of an assessment of culpability for the commitment offense, it was equally relevant to proportionality, the assessment of which was the original purpose of the base term in the wake of *Rodriguez*. He did not maintain the base term was the maximum term that could be constitutionally imposed, but simply that, when set prior to a determination of suitability for parole, it provided an indication whether the denial of parole would result in disproportionate punishment.

During a discovery dispute in which the Board resisted Butler's efforts to obtain demographic data relating to possible racial or ethnic disparities in the granting of parole, the parties settled the case by stipulating to a judicial order "directing the board to publicly announce and implement new policies and procedures that would result in the setting of base terms at life inmates' initial parole consideration hearings or, if that hearing had already taken place, at the next hearing resulting in a grant or denial of parole." (*Ibid*.) Although it did not resolve the parties' disagreement about the purpose of the base term -- the Board believed it served only to promote uniformity, Butler believed it also served the purpose of proportionality -- the settlement made sense for the parties. The benefit to Butler was that fixing the base term prior to the initial parole hearing introduced consideration of proportionality into the process of determining suitability for release: Inmates who had already served their base term could emphasize that at parole hearings and, if denied parole, present the issue to a reviewing court with a developed record. The benefit of the settlement to the Board was that it did not require the Board to do anything it was not already doing except change the timing, and relieved it of the need to provide Butler demographic data that might be indicative of racial bias in the parole

process.[7] Both parties knew their different contentions regarding the role of the base term would eventually have to be judicially resolved, but they were willing to put that off to another day.

Butler then moved for attorney fees pursuant to Code of Civil Procedure section 1021.5, maintaining the settlement he obtained vindicated an important right affecting the public interest by causing the Board to change its policy and set inmates' base terms at the first suitability hearing.

Opposing this motion, and focusing on uniformity rather than proportionality, the Board argued that "the settlement and stipulated order merely create 'a new mutually beneficial term-setting policy,' not 'the vindication of a right the Board had previously violated or curtailed.' " This was so, the Board claimed, " 'because the right [Butler] asserts -- that of a base term calculation at the initial parole hearing -- did not exist until the settlement went into effect.' " The Board argued that *In re Dannenberg, supra*, 34 Cal.4th 1061, upheld the practice of deferring the fixing of the base term until after an inmate was found suitable for release, and no statute required setting the base term before the determination of suitability.

Our court rejected the first argument because *Dannenberg* held only that public safety takes precedence over *uniformity* in sentencing and made clear it does not take precedence over constitutional proportionality, which was the basis of Butler's claim. We rejected the Board's second argument because Butler never asserted a preexisting statutory right to calculation of the base term, but rather that postponement of the

[7] The Board's position that "records regarding the race/ethnicity of the applicants considered for parole" are exempt from disclosure under the Public Records Act" was rejected by the San Francisco Superior Court last year (*Brodheim v. Calif. Dept. of Corrections and Rehabilitation* (July 16, 2020) 2020 WL 4558319), and the Board has not appealed. The superior court observed, "this case unquestionably involves a weighty public interest in disclosure, i.e., to shed light on whether the parole process is infected by racial or ethnic bias. The importance of that public interest is vividly highlighted by the current national focus on the role of race in the criminal justice system and American society in general."

calculation obstructed his and other inmates' constitutional right to proportionate punishment.

We were not asked to, and did not, say the adjusted base term represented the maximum punishment that may constitutionally be imposed on a parole eligible life prisoner. But we agreed with Butler that the base and adjusted base terms relate to proportionality as well as uniformity, and awarded him public interest attorney fees because the settlement restored consideration of proportionality in punishment during the parole process.

We explained, "[u]niformity and proportionality, the dual sentencing principles the Legislature thought best served the punitive purpose of the DSL (§ 1170, subd. (a)), are conceptually related. The principles can conflict: imposing the same sentence on all persons convicted of an offense would serve the purpose of uniformity, but it would disserve the principle of proportionality because no offense is always committed in the same circumstances and those who commit the same offense are not all equally culpable or blameworthy. But these two sentencing principles usually do not conflict and in practice they are largely complementary. Both are linked to retribution and both also serve the law's preference for discernible norms and enhance public respect for the criminal law and criminal justice systems, which is essential to the reduction of crime. (Frase, *Punishment Purposes* (2005) 58 Stan. L. Rev. 67, 74-79 ['Proportionality and uniformity of sentencing are based on widely shared fairness concerns, so highly disparate penalties are likely to reduce the public's willingness to obey the law and cooperate with law enforcement.'].)" (*In re Butler, supra*, 236 Cal.App.4th at pp. 1236.)

Our opinion also pointed out that the dual requirements of uniformity and proportionality set forth in Penal Code section 1170, subdivision (a), "clearly reflect a legislative desire to place limits on the largely unmitigated retributivism that might otherwise result from a parole system governed solely by predictions whether an inmate presented a threat to public safety. In the wake of *Dannenberg,* the only limitation that may be placed on the retributivism that might otherwise result from the systematic denial of parole is the constitutional prohibition of excessive punishment. The Board's position

that it may deny a prisoner release on parole based on its determination that he or she presents a risk presents a danger to public safety '[r]egardless of the length of time served' (Cal. Code, Regs., §§ 2281, subd. (a), 2402, subd. (a), italics added) would remove *all* limits on the severity of punishment the Board can impose." (*In re Butler, supra*, 236 Cal.App.4th at p. 1237, italics added.)

The Board did not seek review of this opinion, and continued to comply with the settlement agreement and stipulated order requiring it to fix the base term prior to inmates' initial parole hearing.

Eight months after our opinion was filed, however, the Board filed a motion to "modify" the settlement by eliminating the need to set the base term at the commencement of the parole process. The motion was based on the grounds that post settlement legislation constituted a material change in the facts, rendering the stipulated judgment "unnecessary." Specifically, the Board maintained there was no longer a role for base terms in the parole process because amendments to section 3041 by Senate Bill 230, sponsored by Senator Loni Hancock, repealed the requirement that release dates be set in a manner providing "uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public" – which the Board viewed as its authority for setting base terms – and required that inmates be released immediately upon a grant of parole becoming effective, as long as statutorily mandated minimum terms had been served.[8] The Board also relied upon new statutes relating to parole of youth offenders and elderly inmates, which specifically required release upon a grant of parole in those cases.

We denied the motion and the Board filed a petition for review. The California Supreme Court agreed with the Board that new legislation rendered the base term (and the settlement) "unnecessary," and reversed our denial of the Board's motion to wipe out the settlement agreement. (*Butler, supra,* 4 Cal.5th 728.) As a result, the Board ceased

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[8] The primary purpose of the bill, which is different, is described, *post*, at p. 26, fn. 15.

calculating base terms and repealed all provisions of its regulations pertaining to the base term.[9]

The Supreme Court commenced its analysis in *Butler* with the observation that "the settlement was premised on the idea that 'base terms' played some role -- defined by statute -- in determining release dates for those sentenced to indeterminate terms" and, due to post settlement legislation, this is no longer the case. (*Butler, supra*, at p. 732.) As the Supreme Court noted, "[a]t the time of the settlement agreement, 'base terms' governed the earliest possible release date for inmates serving indeterminate sentences." (*Ibid.*) It is true that the base term played this role after the Board, in service of the goal of uniformity, postponed the time at which it was fixed. But the settlement, which eliminated the postponement, was not premised on the idea that uniformity was the *only* role the base term played, nor was it premised on the idea that the role of the base term was "defined by statute." The phrase "base term" never appears in the Penal Code.

In any case, the Supreme Court's point -- that new legislation requiring inmates to be released when they are found suitable for parole eliminates the need for the Board to fix release dates, thereby rendering the base term useless and the stipulated judgment "unnecessary" -- makes sense only if the *only* purpose of the base term is to determine the release date in a manner that promotes the statutory goal of uniformity. That is, the high court's rationale depends upon the assumption that the base term has nothing to do with proportionality in sentencing. Unfortunately, that is the proposition for which the

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[9] I do not know whether the Supreme Court or any court has ever previously undone a voluntary settlement solely on the grounds it is no longer "necessary" or "desirable," but it is certainly uncommon. The *Butler* opinion stated that it found no reason to "enshrine the base term as constitutionally required" (*id*. at p. 745), but no one asked it to. All Butler asked was compliance with the terms of the settlement, which did not require the Board to do anything unlawful. It simply provided Butler the opportunity to make a record and show a judicial body that fixing the base term promptly would advance compliance with the principle of proportionality in punishment. Moreover, the post settlement legislation rendered the settlement "unnecessary" only if the base term assessment of culpability serves no constitutional purpose, and the Supreme Court did not go quite that far.

Supreme Court's opinion now stands, despite the fact it cannot be reconciled with the provenance of the base term and the indisputable fact that it can only reasonably be seen as an assessment of culpability, which is the referent of the constitutional principle of proportionality in punishment. As a result of *Butler*, rights of prison inmates protected by the Eighth Amendment and article I, section 17 of the California are ignored by the Board and almost impossible to enforce.

The Supreme Court noted that our opinion awarding Butler public interest attorney fees "discussed in some detail the Court of Appeal's theory about the constitutional significance of base terms." (*Id*. at p. 736.) Yet though it repudiated our conclusion that prompt fixing of the base term helped " 'ensure life prisoners do not serve terms disproportionate to the culpability of the individual offender' " (*Butler, supra,* 236 Cal.App.4th at p. 1231, quoting *In re Stoneroad* (2013) 215 Cal.App.4th 596, 617), the Supreme Court did not find it necessary to refute that proposition and the reasons we gave in support of our analysis.

The Supreme Court's confidence lifers do not need protection against disproportionate punishment as part of the parole process is difficult to understand. The court reiterated its explanation in *Dannenberg* "that *Rodriguez's* prophylactic measures" are not "constitutionally required" in the state's "current, mostly determinate sentencing regime," as lifers constitute a "narrower category" of serious offenders and, "[b]ecause of their culpability, there is a 'diminish[ed] possibility' that these serious offenders will suffer constitutionally excessive punishment." (*Butler, supra,* 4 Cal.5th at pp. 744-745.) Yet, while the category of offenders sentenced to indeterminate terms is necessarily "narrower" under the DSL than when *all* inmates received indeterminate sentences, the number of individuals in this category is significant and growing. At the time of the *Butler* litigation, the state prison population included 34,388 indeterminately sentenced prisoners (27,431 lifers and 6,957 third-strikers), more than a quarter (26.4 percent) of the total prison population (then 130,263 prisoners). (CDCR*, Offender Demographics for the 24-month period, ending December 2017*, at pp. 4, 6.) The number of indeterminately sentenced prisoners serving time under the DSL is now greater than the *entire* California

prison population at the time *Rodriguez* was decided**.** (U.S. Dept. of Justice, Bureau of Justice Statistics, Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86 (May 1988).)

Furthermore, the rates at which lifers are granted parole are incongruously low.[10] For example, a 2011 study suggests the parole process at that time had all but converted life with the possibility of parole into life without that possibility. (Weisberg, et al., Stanford Criminal Justice Center, Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California (Sept. 2011) (Stanford Study).) In the sample of hearing transcripts studied, life prisoners were granted parole at only 2.2 percent of initial parole hearings and at less than 15 percent of all subsequent hearings. (Stanford Study, at p. 18.) The report stated that "[t]he grant rate has fluctuated over the last 30 years— nearing zero percent at times and never arising above 20 percent." (*Id.* at p. 4.) In 2020, 16 percent of parole hearings scheduled resulted in grants of parole. (Board of Parole Hearings, 2020 Report of Significant Events, pp. 1, 6.) And this low rate is despite recent reforms that encouraged grants of parole for youth offenders and elderly inmates.[11]

The Supreme Court's statement that, due to their culpability, there is a "'diminish[ed] possibility' that lifers will suffer constitutionally excessive punishment" (4 Cal.5th at p. 745), also ignores the breadth of the crimes that may now be indeterminately sentenced.

Lifers include juveniles convicted of offenses that caused no physical harm to the victim (e.g., *In re Palmer, supra,* 10 Cal.5th 959), the many third-strikers convicted of

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[10] Because, as the Stanford Study pointed out, the recidivism rate of life prisoners is "miniscule") due to the fact that at the time they become eligible for parole most have "aged out" of crime.

[11] In 2019, the year after *Butler* was decided, sixty-one percent of hearings for indeterminately-sentenced youth offenders resulted in a denial, and sixty-eight percent of hearings held for indeterminately sentenced inmates eligible for an elderly parole hearing resulted in a denial. (CDCR, 2019 Significant Events: Workload at a Glance (Feb. 18, 2020 at p. 7.)

crimes such as robbery with little or no physical harm to the victim, and prisoners who were accomplices to the attempted murder of a person who abused them. The Board's indifference to proportionality also allows enormous disparities in the time actually served by lifers. For example, persons convicted of kidnapping with the use of a firearm to advance the purposes of a gang may have the same minimum eligible parole date as someone convicted of first-degree murder (25 years to life) but serve 50 years, twice the time for arguably less culpability. A recent study showed that, on average, youth offenders convicted of murder in the first degree served 2.7 years over the statutory minimum (25 years) and those convicted of second-degree served 8.7 years over that minimum - an *inverse* relationship between the severity of the crime and the time served over the minimum. (Bell, *A Stone of Hope, Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions* (2019) 54 Harv. C.R.-C.L. L. Rev. 458, 507, fn. 184 (*Stone of Hope*).) The same study showed that for the group eventually granted parole, the longest period of time served by youth offenders convicted of a non-homicide, non-sexual offense (35 years) exceeded the longest time served by those convicted of second-degree murder (28 years). (*Id*., p. 507, Table 10).

These disparities - which the author of the study attributes to documented racial bias -- are countenanced because the Board pays no attention to culpability (and therefore proportionality) during the parole process.

The *Butler* court also stated that lifers are "protected against disproportionate punishment through other means" than base terms, referring to "provisions ending indeterminate sentences when individuals have served the statutory minimum term and have been found suitable for release" – that is, the youth offender and elderly parole provisions and the amendment of section 3041**.** (*Butler, supra*, at p. 732.) This conclusion suggests the court believes parole is likely to be granted when inmates reach their parole eligibility dates, presumably because section 3041 continues to provide that the board "shall normally grant parole" one year before an inmate's minimum eligibility date. But this is an event that in fact rarely occurs. As Justice Moreno has pointed out, in the eyes of the parole board " 'normally can mean 'almost never' and the Board can

disregard the statutory mandate that parole dates be set proportionally in relation to the magnitude of the offense." (*Dannenberg, supra*, 34 Cal.4th at p. 1101 (Dis. Op. of Moreno, J.) Indeed, as previously noted, at the time of the Stanford Study only 2.2 percent of applications for parole were granted at the initial parole hearing. And the idea that inmates are protected against disproportionate punishment by a statutory requirement that they be released once found suitable ignores the fact that the *Butler* opinion leaves the Board's ability to serially deny suitability on the basis of a prediction of dangerousness unimpaired either by statute or any constitutional consideration.

The *Butler* court's observation that inmates "retain the ability to perform the base term calculation or something equivalent and submit it to the Board for consideration" (*Butler,* at p. 747) reintroduces the untenable situation *Rodriguez* and the early base term regulations sought to alleviate. The idea that the Board -- which has for decades adamantly resisted any constitutional limitations on its ability to deny parole solely on the basis of a prediction of dangerousness -- would be influenced by a base term "or something equivalent" submitted by an inmate at a parole hearing is difficult to take seriously, even indulging the dubious assumption life prisoners possess the ability to ably calculate a creditable base term (an assumption repudiated by the Supreme Court in *Rodriguez, supra* 14 Cal.3d at p. 654, fn. 18).

The Supreme Court says "[c]alculating a base term does not serve as a judgment on constitutional proportionality" because it does not involve the "broad, fact-specific inquiry" courts engage in to assess constitutional proportionality claims, which must consider the "totality of the circumstances surrounding the commission of the offense.'" (*Id*. at p. 746, quoting *People v. Dillon* (1983) 34 Cal.3d 441, 447.) But this point is based on consideration of only the "two-factor matrix method used to calculate a base term" (*ibid.*), apparently focusing on the basic factors regarding the crime directly measured by the matrices and ignoring the *thirty* other *non-exclusive* factors identified in Board regulations as justifying aggravation or mitigation of the base term (former 15 Cal. Code Regs., §§ 2404-2405), as well as the adjustments for specified factors including other offenses and prior prison terms (former 15 Cal. Code Regs., §§ 2406, 2407. (The

regulations specifying the 30 factors are set forth in Appendix B.) It is unreasonable to think these numerous factors, in conjunction with those identified by the matrices and the Sentencing Rules for the Superior Courts, which Board regulations also allow to be considered, are insufficient to reflect "the totality of the circumstances surrounding the commission of the offense" and inform an assessment of culpability.

II.

The Need for a Legislative Solution and Possible Approaches

California shifted away from an entirely indeterminate sentencing scheme in 1975 largely due to the growing belief subjective predictions of dangerousness are unreliable. The most influential proponent of this view at that time was Dr. Bernard Diamond (Professor of Law at the UC Berkeley School of Law and Clinical Professor of Psychiatry at UCSF Medical School). In *The Psychiatric Prediction of Dangerousness* (1974) 123 U. Pa. L. Rev. 439, Dr. Diamond described studies whose "findings so consistently demonstrate that psychiatrists over-predict dangerousness by huge amounts that the studies must be taken seriously." (*Id.* at p. 445.) In Dr. Diamond's view, "[n]either psychiatrists or other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of dangerousness." (*Id*. at p. 452)

Norval Morris, a leading American criminologist, also believed prediction of criminality "an unjust basis for imposing a sentence of imprisonment," because "it presupposes a capacity to predict future criminal behavior quite beyond our present technical ability." (Morris, The Future of Imprisonment (1974) at p. 62; see also Von Hirsch, Doing Justice: The Choice of Punishments (Hill & Wang 1976) at p. 22.) In support of his dim view of such predictions and the tendency of parole authorities to over-predict dangerousness, Morris relied on studies of a California Department of Corrections research group that developed a "violence prediction scale" for use in parole decisions. "The use of this scale resulted in 86 percent of those identified as potentially dangerous failing to commit a violent act (more accurately, to be detected in a violent act)

while on parole." A parallel effort to predict Youth Authority wards as likely to be violent on parole produced a 95 percent overprediction of violence. (*Id*. at p. 34.)

Years later, predictions of dangerousness remain unreliable. In a 2019 article, Professor Michael Tonry observed that "accuracy is little better now than it was four decades ago. . . In Morris's time, the state of the predictive art . . . was that two-thirds of individuals predicted to be violent were false positives. [¶] The technology of violence prediction is vastly more sophisticated than it was four decades ago. The early studies were based on clinical predictions by doctors, mental health specialists, judges, and correctional personnel. The contemporary literature is actuarial and is based on mathematical models, sophisticated statistical analyses, machine learning, and 'big data.' One might expect that violence predictions today would be vastly more accurate than in the 1970s. They aren't." (Tonry, *Predictions of Dangerousness in Sentencing: Déjà vu All Over Again* (2019) 48 Crime and Justice 439, 450.) According to Professor Tonry, two of the leading meta-analyses of the accuracy of prediction instruments "conclude that positive predictions of future violence are too inaccurate to be used in sentencing" and "[e]ven outspoken defenders of risk prediction agree" they should not be the sole or primary basis of sentencing decisions. (*Id.* at p. 452.)

The 1986 Miller and Morris article, which remains among the most insightful analyses of the use of predictions of dangerousness, makes a number of points the Committee should consider. (The standard put forth by Miller and Morris was accepted by the National Academy of Sciences as its official position on predictions of dangerousness. (*Predictions of Dangerousness, supra,* 2 Notre Dame J. L. Ethics and Pub. Pl'y at p. 393.))[12] Writing at a time when use of predictions of dangerousness was

[12] The standard advanced by Miller and Morris is not perfect. As Professor Tonry noted, "Morris wrote before much evidence had accumulated on the racial disparities inexorably produced by predictive sentencing and without considering the implications of use of youth, gender, race-correlated socioeconomic status, and bias-contaminated criminal history variables." (Tonry, *Predictions of Dangerousness in Sentencing: Déjà vu All Over Again, supra,* at p. 468.) Nevertheless, our Legislature and courts have accepted a parole system based on evaluation of dangerousness, and in such a system, the

being widely criticized due to doubts about "accuracy, efficacy and morality," Miller and Morris make a persuasive case for accepting the need for such predictions (due to their wide use in criminal law and judicial acceptance of their use), but imposing constraints in order to "justly differentiat[e] among individuals." (*Id*. at p. 395.) The authors point out that statistical prediction refers to *group*s, *not individuals*: Prediction of future dangerousness based on an individual's membership in a defined group possessing certain attributes refers to a *condition* rather than the result in an individual case, and the question is "the justice of applying to each individual powers influenced by his membership in that group." (*Id.*, at pp. 410-411.) Recognizing that predictions will often be wrong, Miller and Morris point out that the issue is relative, not absolute, accuracy, and studies have repeatedly shown that " 'nonstatistical prediction in bail and sentencing decisions . . . produce[s] errors at a higher rate than the more scientific approach.'" (*Id.*, at p. 420, quoting Forst, *Selective Incapacitation: A Sheep in Wolf's Clothing?* 68 Judicature 153, 157, fn. 9 (1984).) In their view, "clinical" predictions of dangerousness made on an "intuitive, untested, and unverifiable basis" should not be relied upon as the basis for extended incarceration; predictions of dangerousness based on how an individual behaved in the past ("anamnestic prediction") and how similarly situated individuals behaved in the past ("actuarial prediction") are far more reliable, provided the systems of prediction do not rely on information -- "like poor employment records, educational deficiencies, residential instability -- that more commonly characterize minority communities." (*Predictions of Dangerousness, supra,* 2 Notre Dame J. L. Ethics and Pub. Pl'y at p. 404-405, 421 and fn. 25.) Miller and Morris maintain it is much easier for bias or prejudice, unconscious or otherwise, to enter into a discretionary process when there are not neutral, or at least testable, principles to guide the decision. Therefore, they see "predictions of dangerousness, used as a guide to discretion, as a tool which is likely to reduce the impact of racial bias." (*Id*. at p. 421.)

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emphasis Miller and Morris place on proportionality and objective evidentiary assessment is critical.

There is evidence that the "intuitive, untested, and unverifiable" manner in which the Board predicts whether applicants for parole remain dangerous involves racial bias. An empirical study conducted by Professor Kristen Bell produced data showed that "[a]mong Black parole candidates who have not retained a private attorney and who have no prior experience with the board, one of twenty-four candidates (4%) was granted parole. The grant rate was eighteen times higher among non-Black parole candidates who have retained an attorney and have prior experience with the board. Of those candidates, thirty-four of forty-seven (72%) were granted parole." (Bell, *Stone of Hope, supra,* 54 Harv. C.R.-C.L. L. Rev. at pp. 491-492.)[13]

The two most critical principles Miller and Morris advance are that (1) punishment should not be imposed or increased based on predicted dangerousness "beyond that which would be justified as a deserved punishment independently of that prediction" and (2) an individual's predicted dangerousness should be assessed by comparison to the "base expectancy rate of violence" for a group of others who committed similar offenses and had similar criminal records. (*Id.* at pp. 431-433.)[14] "Base expectancy rate" is "the expected rate-at which a given event occurs across a population"; for example, a 50% expectancy rate means 50 individuals in a group of 100 would be expected to act in accordance with the prediction. (*Id.* at p. 404, fn. 21.)

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[13] On the presence of racial and ethnic bias in the parole process generally see Huebner & Bynum, *The Role of Race and Ethnicity in Parole Decisions* 46 CRIMINOLGY 907 (2008)

[14] Miller and Morris define "dangerousness" as "intentional behavior that is physically dangerous[] to the person or threatens a person or persons other than the perpetrator – in effect, . . . assaultive criminality," viewing "serious physical injury to the person or the threat of such injury" as "what emotionally fuels the whole movement toward the use of predictions of dangerousness in the criminal law." (*Predictions of Dangerousness, supra,* 2 Notre Dame J. L. Ethics and Pub. Pl'y at p. 402.) Their definition is consistent with Penal Code definitions, such as defining "unreasonable risk of danger to public safety" to mean "unreasonable risk that the [individual] will commit a new violent felony within the meaning of clause (iv) of subparagraph (c) of paragraph (2) of subdivision (e) of Section 667." (Pen. Code, § 1170.18.)

The "first principle" of the Miller and Morris article is, in essence, a requirement of proportionality as the upper limit on punishment.

The second principle is a requirement that empirical evidence underlie and corroborate the prediction.

Miller and Morris maintain that "[t]he base expectancy rate of violence for the criminal predicted as dangerous must be shown by reliable evidence to be substantially higher than the base expectancy rate of another criminal with a closely similar record and with a conviction of a closely similar crime but not predicted as unusually dangerous, before the greater dangerousness of the former may be relied on to intensify or extended his punishment. . . . Only by comparing the predictions for individuals within relevant groups to the base expectancy rate of violence for that group can the decision be made about whether the use of the prediction is proper in controlling the individual." (*Id*. at p. 433-434.)

As earlier noted, the two factors Miller and Morris look to in defining the group against which a defendant's dangerousness should be assessed – similarity of offense and criminal record - are the two factors that were considered in calculating an inmate's "primary term" under the parole board regulations implementing *Rodriguez.* Even without a fixed, constitutionally maximum term, because these two factors measure individual culpability for the commitment offense, they provide a rough but useful yardstick for assessing proportionality. In dismissing the need to calculate base terms, the Supreme Court's *Butler* opinion thus relieved the Board of the need to undertake assessments of culpability that facilitate evaluation of proportionality as a check on predictions of dangerousness that result in extended imprisonment. It is appropriate for the Legislature to rectify this problem because it was created by the Supreme Court on the basis of reforms the Legislature could not have predicted would have this effect.[15]

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[15] Ironically, the problem the Legislature sought to remedy by repealing the provision in section 3041 that "a life prisoner's parole release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to the public" (Stats. 2015, ch. 470) -- which the Board viewed as its

There are a variety of other ways in which the Legislature could cabin the constitutionally unfettered discretion of the parole board to predict dangerousness. Professor Kristen Bell proposes the use of "a presumptive-maximum parole-release date" - that is, "a point in time at which the sentence does not technically expire, but a very strong presumption of release from prison takes hold. The parole board would retain broad discretion to grant or deny parole prior to the presumptive-maximum date, but when a person reaches the presumptive maximum, the parole board would have extremely limited discretion to deny release. For example, once a person has reached the presumptive maximum, the parole board would be required to grant release unless there is clear and convincing evidence the person poses a threat of grave physical injury to others that cannot be managed in a non-custodial setting." (*Stone of Hope, supra,* 54 Harv. C.R.-C.L. L. Rev. at p. 529.)

The presumptive maximum "could be defined as the point at which an individual has completed some defined number and type of rehabilitation programs. Or it could be defined as the point at which an individual has completed programs and has served some baseline number months without a disciplinary write-up." (*Ibid*.) Alternatively, the presumptive maximum could be based solely on a minimum parole eligibility date, such as having served more than 110% of their minimum time served.

Professor Bell also posits that the presumptive maximum term could be set at the sentencing hearing "based on an individualized proportionality judgment about the gravity of a crime in a given case," such as the base term conceived in the wake of

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authority for setting base terms that pertained solely to uniformity, and the repeal of which the Supreme Court relied upon in finding base terms no longer necessary (4 Cal.5th at p. 737) -- was that inmates were being retained in prison too long. (Sen. Com. on Public Safety, Analysis of Sen. Bill 230 (2015-2016 Reg. Sess.) April 27, 2015, pp. 4-5.) As stated by the author of the bill, inmates could reach their minimum parole eligibility dates and be found suitable for release but still be required to serve additional time because they had not yet fully served their adjusted base terms. (*Ibid*.) The repeal of the uniformity provision (and therefore, as the *Butler* court saw it, the elimination of a need for the base term) thus appears to have been intended to avoid prolonging the incarceration of an inmate found suitable for parole.

Rodriguez. (*Id.* at p. 530) In her view, "[t]rial judges are better situated than a parole board (or the legislature) to make proportionality judgments about the crime because judges have greater expertise in proportionality analysis and are more proximate to the facts of the crime." (*Id.* at pp. 530-531.)

The views of the experts just described are not shared by the present parole board. In its recent opinion in *In re Palmer, supra*, 10 Cal.5th 959, the court stated that, because the " 'paramount consideration' in making release determinations remained 'whether the inmate currently poses a threat to public safety[,]'" "[i]f the inmate remains a danger, the Board 'can, and must decline to set a parole date.'" (*In re Palmer,* at p. 970, quoting *In re Lawrence* (2008) 44 Cal.4th 1181, 1210, 1227, and citing Board regulation § 2281, subd. (a) ['Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.'].) In other words, *Palmer* says (without further explanation), "the Board is not ever required, when making parole decisions, to consider whether an inmate's punishment has become constitutionally excessive." (*In re Palmer,* at p. 968, 971.) Instead, the responsibility to decide whether an inmate's punishment has become constitutionally excessive rests solely with the courts.

The parole process described by *Palmer* is deficient in two major respects.

First, *Palmer* not only absolved the Board of any responsibility to consider constitutional proportionality, but did so without imposing any requirement that the Board employ evidence to independently corroborate unreliable predictions of dangerousness. The result violates both of the two most critical principles advanced by Miller and Morris and others: (1) that punishment should not be imposed or increased based on predicted dangerousness "beyond that which would be justified as a deserved punishment independently of that prediction" and (2) that an individual's predicted dangerousness should be assessed by comparison to the "base expectancy rate of violence" for a group of others who committed similar offenses and had similar criminal

records. A prediction of dangerousness not independently supported by testable evidence is not only unduly unreliable, but amenable to corruption by racial and/or ethnic bias.

The second flaw in the process described in *Palmer* is the unduly optimistic assumption that a constitutional claim never considered by the Board can "readily" be dealt with in the courthouse. As earlier pointed out, an important reason the *Rodriguez* court required the parole board to immediately assess the culpability of inmates was its concern that their constitutional claims in propria persona could not otherwise be meaningfully reviewed. "Were unrepresented prisoners required to take the initiative by seeking relief at such time as they believed their imprisonment to be constitutionally impermissible, not only might abuses such as that in the instant case and that in *Lynch* recur, but courts would continue, as now, to receive inadequate petitions unaccompanied by necessary supporting data. Since prison inmates understandably lack perspective as to the propriety of their continued incarceration, and also lack the ability to marshal the facts and applicable law in support of their claims, it is probable that courts would be burdened by a flood of meritless petitions." (*Rodriguez, supra*, 14 Cal.3d at p. 654, fn. 18) However, if the Board or some other agency must assess proportionality, it will collect the relevant data, which will facilitate an inmate's presentation of a claim to the courts and the courts' provision of meaningful review.

Viewed from the perspective of proportionality, the absence of a device like the base term or a presumptive maximum parole-release date enables the indefinite incarceration of life prisoners eligible for parole based solely on the Board's unreliable predictions of dangerousness. Reliance on a prediction of dangerousness cannot be countenanced unless the Legislature requires that it be corroborated by neutral principles based on evidence that can be subject to empirical test. The base term that evolved from *Rodriguez* is predicated on such a neutral principle -- that of constitutional proportionality -- and the fixing of such a term on the basis of objective factors relating to culpability places a prisoner in a group whose "base expectancy rate of violence" can be calculated (by the Board or perhaps by a sentencing court pursuant to guidelines promulgated by the

Judicial Council)[16] and employed as a means of cabining the discretion of the Board so as to avoid constitutionally excessive punishment

* * * * *

In 1975, when the ISL was replaced by the DSL, there was broad agreement that the many deficiencies of our indeterminate sentencing system were intolerable and dramatic change was required. The rejection of what was only putatively a rehabilitative system was reflected in the first sentence of the DSL, which was the legislative finding and declaration "that the purpose of imprisonment for crime is punishment." (1976 Stats., Ch. 1139, p. 5140 (Sen. Bill No. 42), amending Penal Code section 1170, subd (a).) The declaration went on to state that the purpose of punishment "is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstance" and that "the elimination of disparity and the provision for uniformity of sentences can best be achieved by determinate sentences fixed by statute." (*Ibid*.)

Because "punishment" did not fit the situation of indeterminately sentenced prisoners it was subsequently amended, so that section 1170, subdivision (a)(1), now states that "the purpose of sentencing is public safety achieved through punishment, *rehabilitation*, and restorative justice. When a sentence includes incarceration, this purpose is best achieved by terms that are proportionate to the seriousness of the offense with provision of uniformity in the sentences of offenders committing the same offense under similar circumstances." (Italics added.)

The Legislature has thus declared that -- though they were subjected to a nominally rehabilitative, not punitive, sentencing scheme -- the punishment of indeterminately sentenced lifers eligible for parole should be proportionate to their culpability and consistent with the sentences of offenders whose culpability is similar to

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[16] The DSL currently provides that "in sentencing a convicted person, the court shall apply the sentencing rules of the Judicial Council. (§ 1170, subd. (a)(3))

their own; a principle also embodied in the opinion of the Supreme Court in *In re Lynch, supra*.

As I have explained, California parole boards have long defied the legislative mandate for proportionality and uniformity in the punishment of indeterminately sentenced persons, as they also long evaded the theses of the California Supreme Court in *Rodriguez*, which remain pertinent. The Legislature has the power to rectify this defiance, and it is my hope that, after studying the issue, this Committee will urge it to do so. The indifference of the Board to the constitutional limits of its power to punish has in my view resulted in injustice and cruelty that should no longer be ignored.

APPENDIX

A

§ 2403. Base Term.

(a) General. The panel shall set a base term for each life prisoner who is found suitable for parole. The base term shall be established solely on the gravity of the base crime, taking into account all of the circumstances of that crime. If the prisoner has been received in prison for more than one murder committed on or after November 8, 1978, the base crime is the most serious of the murders considering the facts and circumstances of the crime. If the prisoner has been sentenced to prison for murders committed before November 8, 1978 and for murders committed on or after November 8, 1978, the base offense shall be the most serious of the murders committed on or after November 8, 1978.

The base term shall be established by utilizing the appropriate matrix of base terms provided in this section. The panel shall determine the category most closely related to the circumstances of the crime. The panel shall impose the middle base term reflected in the matrix unless the panel finds circumstances in aggravation or mitigation.

If the panel finds circumstances in aggravation or in mitigation as provided in §§ 2404 or 2405, the panel may impose the upper or lower base term provided in the matrix by stating the specific reason for imposing such a term. A base term other than the upper, middle or lower base term provided in the matrix may be imposed by the panel if justified by the particular facts of the individual case and if the facts supporting the term imposed are stated.

(b) Matrix of Base Terms for First Degree Murder committed on or after November 8, 1978.

	CIRCUMSTANCES			
First Degree Murder	A. *Indirect*	B. *Direct or Victim Contribution*	C. *Severe Trauma*	D. *Torture*
Penal Code § 189 (in years and does not include post conviction credit as provided in § 2410)	Victim died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack, a crime partner actually did the killing.	Death was almost immediate *or* resulted at least partially from contributing factors from the victim; e.g., victim initiated struggle or had goaded the prisoner. This does not include victim acting in defense of self or property.	Death resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with a weapon not resulting in immediate death or actions calculated to induce terror in the victim.	Victim was subjected to the prolonged infliction of physical pain through the use of nondeadly force prior to act resulting in death.
I. *Participating Victim* Victim was accomplice or otherwise implicated in a criminal act with the prisoner during which or as a result of which the death occurred, e.g., crime partner, drug dealer, etc.	25–26–27	26–27–28	27–28–29	28–29–30
II. *Prior Relationship* Victim was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death. If victim had a personal relationship but prisoner hired and/or paid a person to commit the offense, see Category IV.	26–27–28	27–28–29	28–29–30	29–30–31
III. *No Prior Relationship* Victim had little or no personal relationship with prisoner *or* motivation for act resulting in death was related to the accomplishment of another crime, e.g., death of victim during robbery, rape, or other felony.	27–28–29	28–29–30	29–30–31	30–31–32
IV. *Threat to Public Order or Murder for Hire* The act resulting in the victim's death constituted a threat to the public order including the murder of a police officer, correctional officer, public official, fellow patient or prisoner, any killing within an institution, or any killing where the prisoner hired and/or paid another person to commit the offense.	28–29–30	29–30–31	30–31–32	31–32–33

APPENDIX

B

§ 2404. Circumstances in Aggravation of the Base Term.

(a) General. The panel may impose the upper base term or another term longer than the middle base term upon a finding of aggravating circumstances. Circumstances in aggravation of the base term include:

(1) The crime involved some factors described in the appropriate matrix in a category higher on either axis than the categories chosen as most closely related to the crime;

(2) The victim was particularly vulnerable;

(3) The prisoner had a special relationship of confidence and trust with the victim, such as that of employee–employer;

(4) The murder was committed to preclude testimony of potential or actual witnesses during a trial or criminal investigation;

(5) The victim was intentionally killed because of his race, color, religion, nationality or country or origin;

(6) During the commission of the crime the prisoner had a clear opportunity to cease but instead continued;

(7) The manner in which the crime was committed created a potential for serious injury to persons other than the victim of the crime;

(8) The murder was wanton and apparently senseless in that it was committed after another crime occurred and served no purpose in completing that crime;

(9) The corpse was abused, mutilated or defiled;

(10) The prisoner went to great lengths to hide the body or to avoid detection;

(11) The murder was committed to prevent discovery of another crime;

(12) The murder was committed by a destructive device or explosives;

(13) There were multiple victims for which the term is not being enhanced under Section 2407;

(14) The prisoner intentionally killed the victim by the administration of poison;

(15) The prisoner intentionally killed the victim by lying in wait;

(16) The prisoner occupied a position of leadership or dominance over other participants in the commission of the crime, or the prisoner induced others to participate in the commission of the crime;

(17) The prisoner has a history of criminal behavior for which the term is not being enhanced under Section 2407;

(18) The prisoner has engaged in other reliably documented criminal conduct which was an integral part of the crime for which the prisoner is currently committed to prison;

(19) The prisoner was on probation or parole or was in custody or had escaped from custody at the time the crime was committed;

(20) Any other circumstances in aggravation including those listed in the Sentencing Rules for the Superior Courts.

NOTE: Authority cited: Section 5076.2, Penal Code. Reference: Sections 3040 and 3041 Penal Code.

§ 2405. Circumstances in Mitigation of the Base Term.

(a) General. The panel shall impose the lower base term or another term shorter than the middle base term upon a finding of mitigating circumstances. Circumstances in mitigation of the base term include:

(1) The crime involved some factors described in the appropriate matrix in a category lower on either axis than the categories chosen as most closely related to the crime;

(2) The prisoner participated in the crime under partially excusable circumstances which do not amount to a legal defense;

(3) The prisoner had no apparent predisposition to commit the crime but was induced by others to participate in its commission;

(4) The prisoner tried to help the victim or sought aid after the commission of the crime or tried to dissuade a crime partner from committing other offenses;

(5) The prisoner was a passive participant or played a minor role in the commission of the crime;

(6) The crime was committed during or due to an unusual situation unlikely to reoccur;

(7) The crime was committed during a brief period of extreme mental or emotional trauma;

(8) The prisoner has a minimal or no history of criminal behavior;

(9) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.

(10) Any specific factors in mitigation, including those listed in the Sentencing Rules for Superior Courts.

NOTE: Authority cited: Sections 3041 and 5076.2, Penal Code. Reference: Sections 3040, 3041 and 4801, Penal Code.

HISTORY

1. New subsection (a)(9), subsection renumbering, and amendment of NOTE filed 3–16–2001 as an emergency; operative 3–16–2001 (Register 2001, No. 11). A Certificate of Compliance must be transmitted to OAL by 7–16–2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 3–16–2001 order transmitted to OAL 7–16–2001 and filed 8–20–2001 (Register 2001, No. 34).

Exhibit B

Professor Michael Tonry, University of Minnesota Law School

Available at:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321174

Exhibit C

Professor John Pfaff, Fordham University School of Law

The Need for Prosecutors to Reduce Long Sentences in California

John F. Pfaff*

While much of my scholarly work has been critical of how prosecutors have wielded their discretion to drive up prison populations, even during the 1990s and 2000s as both crime and arrests fell, for this Committee's meeting I want to take what could be seen as an "inverse" perspective: I want to argue that the legislature should look for ways to capitalize on that discretion to *reduce* prison populations.

The heart of my argument is easy to summarize. To Realignment's credit, since 2010 California has seen a significant drop in the number of people locked up for non-violent crimes. As of 2017, only 27% in state prisons had a non-violent top charge. Of course, that then means that nearly 75% are in prison for a violent crime; in fact, fully 25% of people in California's prisons have been convicted of homicide.

This poses a serious challenge for statutory and parole reform. These are the offenses that are least politically amenable to reform,[1] and the ones most vulnerable to "Willie Horton Risk"—the risk that one bad act of recidivism by someone released earlier than otherwise could end the political career of the person authorizing the release, or even the entire program that permitted that release to happen.

All this suggests that while legislatures should *still* look to expand early release—whether via parole reforms, second-look resentencing laws, or expanded compassionate release—and while legislatures should draft these laws in ways that do not categorically exclude those convicted of serious violence, even murder, the legislature should also look for ways to encourage prosecutors to avoid imposing these sentences in the first place. Prosecutors face less "Horton Risk" than parole boards or judges at resentencing: the risk for parole boards or judges starts the moment they authorize release, but for prosecutors it does not arise until someone is released, which for serious violence will still be many years after the sentence is first imposed in the future.

Which is to say: imposing lesser sentences is likely a more politically viable way to consistently reduce sentence length than relying on persistent second-look or parole approaches. And this is a particularly important issue for California, which imposes more long sentences than any other state. While California holds about 8% of the people in state prisons nationwide, a 2020 Sentencing Project report showed it holds about 20% of those serving some sort of life sentence (and fully one-third of those serving life with parole).

* Professor of Law, Fordham University School of Law

[1] It's worth noting, however, that SB 1437's reform of the felony murder rule shows that at least the California legislature, perhaps unique among state legislatures, is willing to wrestle seriously with how we respond to violence.

I want to start, then, by providing a more detailed overview of exactly who is serving long terms in California prisons. And then I'll turn to some possible ways to encourage prosecutors to impose fewer of these sentences.

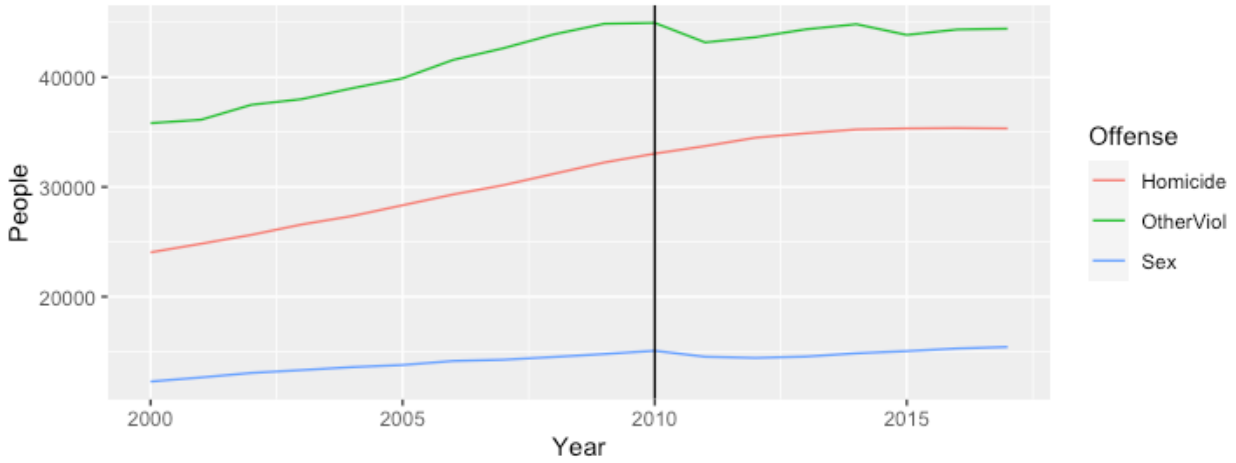
I. Who Is Serving Time in California Prisons

Figure 1 provides the general trends for California from 2000-2017 of what offenses people are in prison for. As of 2017, 27% of those in prison have been convicted of homicide, 38% of homicide or a sex crime, and 67% of homicide, a sex offense, armed robbery, or aggravated assault. Now, it is important to note that these are very broad categories—both armed robbery and aggravated, for example, include a wide range of behaviors, some of which are far less potentially harmful than others; this is true even for homicide, as shown by the motivation behind SB 1437.

But this will nonetheless be the challenge that California (and other states) face going forward: cutting prison populations will increasingly mean sentencing people convicted of violence, often serious violence, to less time.

Fig. 1A: Trends in Calfornia Prison Populations, 2000-2017

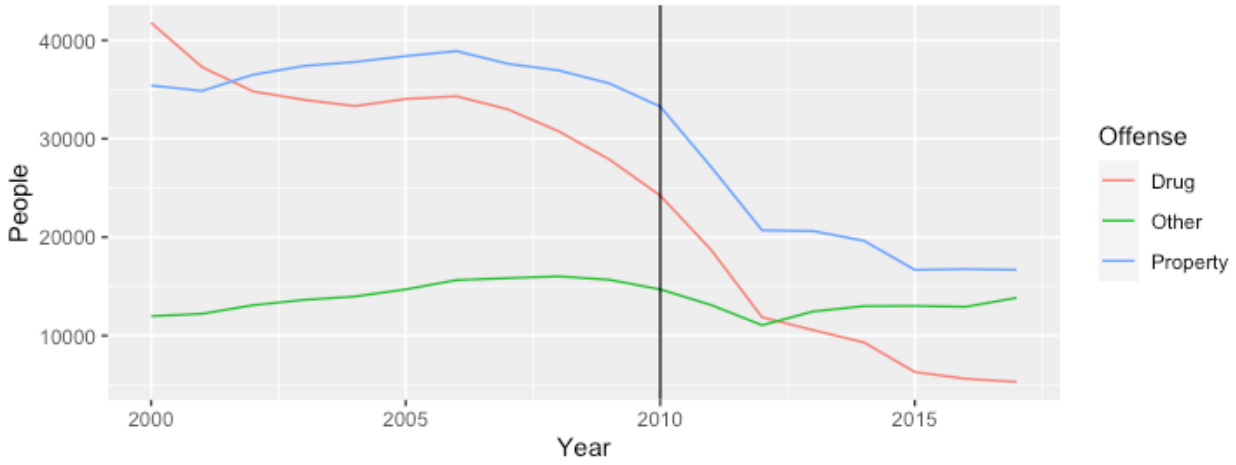
Violent Offenses



Data from the National Corrections Reporting Program. Black line is Realignment.

Fig. 1B: Trends in Calfornia Prison Populations, 2000-2017

Non-Violent Offenses



Data from the National Corrections Reporting Program. Black line is Realignment.

One feature of post-Realignment populations in Figure 1 is should be noted is that it is not just the *share* of people in prison for violence which rose (which, after all, was the very goal of Realignment).[2] Between 2010 and 2017, the total *number* of people in prison for violence rose by about 2,000, from 93,000 to 95,000—driven almost entirely by an increase from 33,000 to 35,000 of those serving time for murder or manslaughter.

[2] I realize that Realignment pushed a significant number of people out of prisons and into jails, and that some—but not all—of the prison decline has been offset by jail increases. For our purposes here, I am just focusing on the prison population.

The central role of violence gets even more significant when we look at the two populations that are most often considered for reforms: those who have already served long sentences (the beneficiaries of things such as second-look acts and other forms of parole expansion) and the elderly in prison (the beneficiaries of broader compassionate release policies).

Table 1 summarizes the offenses for those who, in 2017, had already spent at least 10, 15, 20, or 25 years in prison. As is readily apparent, about 90% or more are in for violence in all four categories, with over 50% of every group in for homicide. For those who have been in for 20 or 25 years, the share in for homicide rises to 70% and then 86%. The population for whom second-look resentencing and parole expansion is most applicable has been convicted of the most serious crimes.

Table 1: Offenses of Those Serving Longer Sentences

Offense	At Least 10 Yrs	At Least 15 Yrs	At Least 20 Yrs	At Least 25 Yrs
Murder	17810	13215	9236	5234
Other Homicide	870	257	55	3
Forcible Rape	1499	958	468	161
Other Sex Offs	2957	1456	504	93
Armed Robbery	4929	2524	932	29
Unarmed Rob	4	4	3	1
Agg Assault	1780	895	313	60
Other Violence	1580	1090	766	443
Property	1966	1343	661	18
Drug Traffic	381	247	117	3
Drug Poss	241	193	95	1
Other	951	591	256	22
Total	34968	22773	13406	6068
% Homicide	53%	59%	69%	86%
% Hom/Sex	66%	70%	77%	90%
% Violence	90%	90%	92%	99%

Now, to be clear, from a public safety perspective, many if not most of these people are safe to release. This is perhaps especially so for those who have already served 20 to 25 years, who will be in their 40s or 50s, often well past the peak ages for violent and anti-social behavior. A 2015 New York Times piece on those resentenced under the 2012 Prop 36 reforms to the three strikes law pointed out that the reoffending rate for those released was one-tenth the state average (5% vs. 50%), in no small part because those released tended to be older. But the politics here are understandably tricky.

Similar challenges will confront compassionate release policies. In 2017, California prisons held about 30,000 people aged 50 or older (21% of the total prison population), and about 10,000 aged 60 or older (7% of the total population). Figures 2A and 2B report the offenses they are serving time for, and given that many—but not all!—of those who are old have been in prison for many years, the pattern is similar to that in Table 1. Of those over 50, 77% have been convicted of violence, with 32% in just for homicide—numbers roughly similar to the overall prison population. For those 60 or older, 82% are in for a violent crime, with nearly 40% in for homicide.

Fig. 2A: People in Prison Over Age 50, by Offense

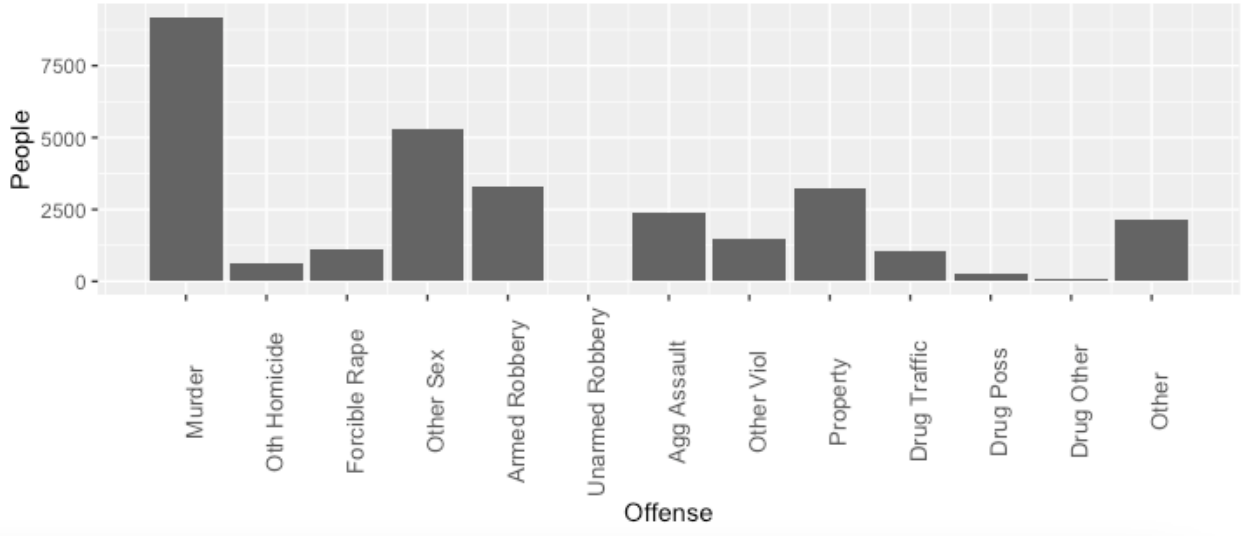
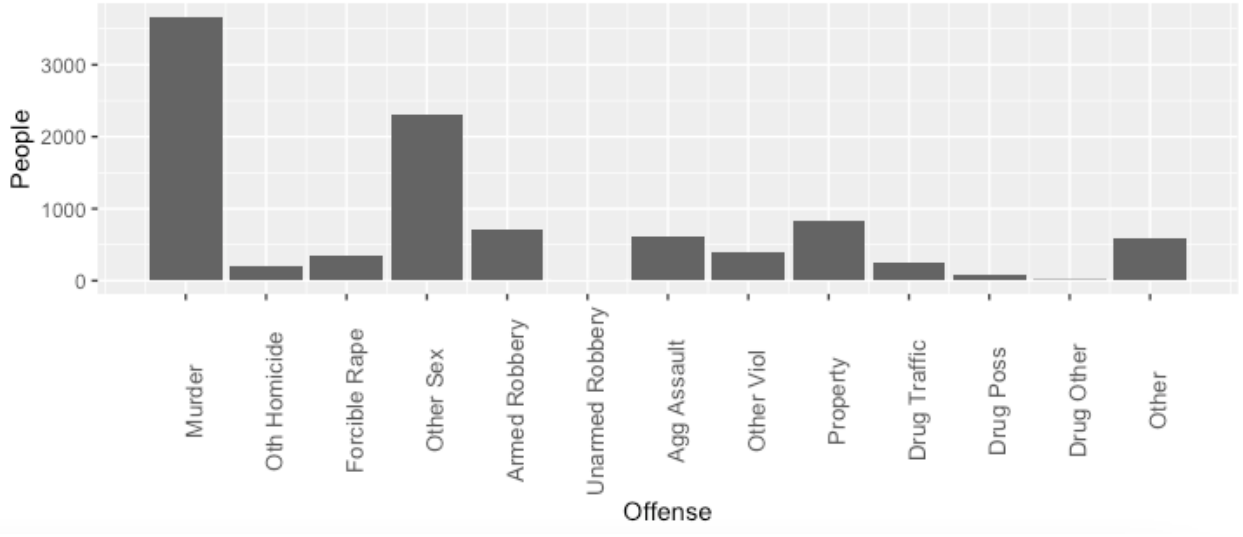


Fig. 2B: People in Prison Over Age 60, by Offense



We can break the older population down a bit. While the conventional wisdom is that our older prison population is mostly people sentenced to very long sentences when young, in 2017 about 46% of the over-50s and 40% of the over-60s had spent less than a decade in prison: these are

people sentenced in their 40s and 50s. And these two populations—the under-10s and the over-10s—look somewhat different. Older inmates who had served less than a decade in prison (whether over 50 or 60) were most likely to have been convicted of a non-forcible rape sex crime. Of those who had spent at least a decade in prison (whether over 50 or 60), the most common offense was homicide. Table 2 gives more detail. For each of these groups, unfortunately, most of the offenses remain those that are politically most challenging to confront.

Table 2: Offenses of Elderly Inmates, By Time Spent in Prison

	Over 50		Over 60	
	Under 10 Yrs	Over 10 Yrs	Under 10 Yrs	Over 10 Yrs
Homicide	14%	48%	17%	53%
Sex	27%	17%	39%	19%
Other Viol	27%	21%	20%	16%
Property	13%	8%	10%	7%
Drug	7%	3%	5%	2%
Other	12%	3%	10%	3%
Total Violence	68%	86%	75%	88%
Total Non-Viol	32%	14%	25%	12%

II. Implications

SB 1437, the recent felony murder reform bill, makes California fairly unique among states in passing a reform law that specifically targets serious violence, murder in particular. But it is also worth noting that SB 1437 addressed what is perhaps the only sort of murder conviction that is genuinely controversial. Reforms aimed at more "conventional" serious violence may be possible, but they will surely be politically more challenging (however much they may be good policy from a public safety perspective).

This suggests that legislatures should also focus on front-end ways to scale back the length of time served in prison: on changing how prosecutors charge *violent crimes* up front, rather than addressing long sentences solely via policing such as second-look sentencing and compassionate release. As I mentioned above, prosecutors likely face less "Horton Risk" for imposing a shorter sentence than judges or parole boards do for ending a sentence sooner. Part of it is timing: if a prosecutor seeks a 10 year sentence for homicide rather than a 25 year one, there's no additional risk of the "one bad outcome" for a decade—by which time the prosecutor may not even be in office, and even if he is, the link between the decision and the reoffending is far more attenuated.

But part of it is more substantive too: people infer how bad a crime is from the very sentence the prosecutor seeks. I was struck in 2017, when President Barack Obama commuted Chelsea Manning's 35 years to the seven served, by how most of the criticism was "she only served 20% of her sentence," not "she only served seven years." The 35 years appeared to be a powerful anchor, one that prosecutors—unlike second-look judges or parole boards—get to set.

I think there are several steps that legislatures can consider taking in this regard, from simple reporting requirements to far more substantial changes.

At the simplest level, the legislature could require that prosecutors report on how many person-years of prison they have sought out each year, with the associated cost to the state. (This is something that Larry Krasner in Philadelphia has done voluntarily, pointing out to the state legislature the long-run cost savings to the state prison system from his decision to charge some homicides as 3rd degree murder instead of 2nd degree—10 year minimums vs. life without parole.) This could make prosecutors, and the voters, think twice about the costs.

At a more intermediate level, the legislature could adjust the state's three strike law—which I realize requires supermajorities to accomplish—to give prosecutors more discretion about when to avoid charging strikes, or to limit when strikes are imposed.[3] A law that gives prosecutors more discretion to be lenient may be more politically tenable than one that constricts severity, and it could be quite effective. It's worth noting that over 30% of the state's population lives in the four counties whose prosecutors recently formed the progressive-leaning Prosecutors Alliance for California, which suggests that reforms that give reform-minded prosecutors more discretion (rather than restricting those who are more punitive) could have real impact.

At the more aggressive level, the legislature could consider something like a "Reverse Realignment": rather than making counties pay for severity, it could reward them for leniency. Prosecutors who can demonstrate that they have cut the number of person-years of state prison capacity they are using can receive some share of the expected costs savings themselves (perhaps directed to the county's overall budget, not just the district attorney's, to get broader political buy-in from county officials and voters).

III. Conclusion

With 8% of the nation's total people behind bars but 20% of those with life sentences, California is an outlier when it comes to severity. This implies that California can accomplish more than most states by focusing on people serving long sentences. But as is true nationwide, those serving long sentences have generally been convicted of serious violence. This suggests that the legislature should focus more—not exclusively, to be clear, but more—on preventing such long sentences from being imposed in the first place, rather than trying to persistently reduce front-end severity via parole or second-look sentencing.

[3] As I'm sure everyone on this committee knows, George Gascon's attempt to drop strikes under the current law is still working its way through the courts. Legislative reform would render the challenge to his policies moot, at least for future cases.

Exhibit D

Jennifer Shaffer, California Board of Parole Hearings

PROPOSITION 57 NONVIOLENT PAROLE REVIEW PROCESS

Report for the Committee on the Revision of the Penal Code

Jennifer P. Shaffer
Executive Officer

July 2021

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Contents

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PROPOSITION 57 NONVIOLENT PAROLE REVIEW PROCESS

INTRODUCTION

This document provides an overview of the California Department of Corrections and Rehabilitation's (CDCR) nonviolent parole review process implemented under Proposition 57 (approved by the voters in November 2016). Under Proposition 57, persons convicted of nonviolent offenses are eligible for parole consideration by the Board of Parole Hearings (Board) once they have served the full term of their "primary offense," which is defined as the longest term of imprisonment imposed by the court, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.[1]

DEFINITION OF NONVIOLENT OFFENSE

Regulations implementing Proposition 57's parole consideration process went into effect on **July 1, 2017**.[2] Under the regulations, a nonviolent offense is any crime not listed as a "violent felony" under Penal Code section 667.5, subdivision (c).[3]

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[1] Cal. Const., art. I, § 32, subd. (a), par. (1).

[2] Cal. Code Regs., tit. 15, §§ 2449.1-2449.7, 3490-3491.

[3] Penal Code, § 667.5, subd.(c) provides:

For the purpose of this section, "violent felony" shall mean any of the following:
(1) Murder or voluntary manslaughter.
(2) Mayhem.
(3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
(4) Sodomy as defined in subdivision (c) or (d) of Section 286.
(5) Oral copulation as defined in subdivision (c) or (d) of Section 287 or of former Section 288a.
(6) Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288.
(7) Any felony punishable by death or imprisonment in the state prison for life.
(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, 12022.8, or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55.
(9) Any robbery.
(10) Arson, in violation of subdivision (a) or (b) of Section 451.
(11) Sexual penetration as defined in subdivision (a) or (j) of Section 289.
(12) Attempted murder.
(13) A violation of Section 18745, 18750, or 18755.
(14) Kidnapping.

It is important to note that although most nonviolent crimes involve criminal conduct in which there is no physical injury, many crimes involving physical injury or threat of physical injury are considered "nonviolent" because they are not a "violent felony" under Penal Code section 667.5, subdivision (c). Examples of crimes excluded from the definition of a violent felony under Penal Code section 667.5, subdivision (c) that involve physical injury or threat of physical injury include the following:

Code Section	Description
Pen. Code § 245(a)(1)	Assault with a deadly weapon (other than a firearm) or force likely to produce great bodily injury
Pen. Code § 243(d)	Battery with serious bodily injury
Pen. Code § 653f(b)	Solicitation to commit murder
Pen. Code § 273.5	Domestic violence
Pen. Code § 273d	Inflicting corporal injury on a child
Pen. Code § 261(a)(3), (4)	Rape where person is prevented from resisting by a drug; rape of an unconscious person
Pen. Code § 236.1(c)	Human trafficking involving a minor
Pen. Code § 191.5(c)	Gross vehicular manslaughter while intoxicated
Pen. Code § 192(b)	Involuntary manslaughter
Pen. Code § 18740	Possessing, exploding, or igniting destructive device with intent to injure, intimidate or terrify

HISTORY OF NONVIOLENT PAROLE REVIEW

Overview

The nonviolent parole review process actually began prior to Proposition 57 and the number of people eligible for parole review has expanded significantly as a result of litigation since Proposition 57 was first enacted.

(15) Assault with the intent to commit a specified felony, in violation of Section 220.
(16) Continuous sexual abuse of a child, in violation of Section 288.5.
(17) Carjacking, as defined in subdivision (a) of Section 215.
(18) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.
(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22.
(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22.
(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
(22) Any violation of Section 12022.53.
(23) A violation of subdivision (b) or (c) of Section 11418. The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

The Proposition 57 nonviolent parole review process was patterned after a similar process referred to as the nonviolent, second-striker parole review process, implemented in **January 2015** under a court order by the Three Judge Panel in the *Plata/Coleman* class action litigation.[4] The parole review process was one of several initiatives in the court order intended to reduce the prison population so that a constitutional level of medical and mental health care could be provided. Key provisions of the court-ordered nonviolent, second-striker parole review process included the following:

- **Eligibility** - persons sentenced to a second strike for a felony offense that was not a violent felony under Penal Code section 667.5, subdivision (c) were eligible for parole consideration
- **Time Served** - persons were eligible once they served 50 percent of their total term
- **Exclusions** - indeterminately-sentenced persons and people required to register as a sex offender were excluded
- **Additional Requirement** - eligible persons had to pass public safety screening criteria to be referred to the Board for parole consideration; the public safety screening criteria excluded persons from parole consideration based on negative in-prison behavior, such as two or more serious rules violations within the preceding year or a Security Housing Unit term within the preceding five years.[5,6]

Proposition 57 expanded the criteria for nonviolent parole consideration. As originally enacted in 2017, all determinately- sentenced persons convicted of nonviolent offenses were eligible for parole consideration under

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[4] *Coleman v. Brown*, (E.D.Cal. Feb. 10, 2014, No. 2:90-cv-00520-LKK DAD (PC), 2014 WL 2889598, 2014 U.S.Dist. Lexis 17913); *Plata v. Brown* (N.D. Cal., No. 3:01-cv-01351-TEH).

[5] Serious rule violations include offenses, which could be punished as a misdemeanor or felony, or that involve force, a breach or hazard to security, a serious disruption to facility operations, or introduction of a controlled substance or dangerous contraband into the facility. (Cal. Code Regs., tit. 15, § 3315.) The Security Housing Unit houses people whose conduct endangers the safety of others, including those found guilty of serious misconduct. (Cal. Code Regs., tit. 15, § 3341.3.)

[6] Former Cal. Code Regs., tit. 15, § 3492 (repealed) stated in relevant part:

> (c) An inmate is eligible for referral to the Board of Parole Hearings if, on the date of the screening, all of the following are true:
> (1) The inmate is not currently serving a Security Housing Unit term;
> (2) The Institutional Classification Committee has not assessed the inmate a Security Housing Unit term within the past five years, unless the department assessed the Security Housing Unit term solely for the inmate's safety;
> (3) The inmate has served a Security Housing Unit term in the past five years that was not assessed solely for the inmate's safety;
> (4) The inmate had been found guilty of a serious rule violation for a Division A-1 or Division A-2 offense within the past five years;
> (5) The inmate has not been assigned to Work Group C in the past year;
> (6) The inmate has not been found guilty of two or more serious Rules Violation Reports in the past year;
> (7) The inmate has not been found guilty of a drug-related offense or refused to provide a urine sample in the past year;
> (8) The inmate has not been found guilty of any Rules Violation Reports in which a Security Threat Group nexus was found in the past year.

Proposition 57, not just persons whose sentences had been doubled as a second strike. As a result, persons sentenced to multiple consecutive terms without a second strike were eligible for the process under Proposition 57. In addition, many were eligible for parole review earlier in their sentence - once they served the full term of their primary offense, rather than 50 percent of their total term.

As illustrated below, under Proposition 57 the amount of time some people have to serve before they are eligible for parole consideration is the same as it was under the court-ordered process; however, for others it is much less than 50 percent of their total term, depending on their convictions and how they were sentenced.

Example 1: No Difference in Minimum Time to Serve

Convictions and Enhancements	Sentence
PC 246.3(a) discharge of firearm with gross negligence	2 years
Alternative sentence: term doubled as a second strike	2 years
Total Sentence	4 years
Parole Eligibility	**Time to Serve**
Court-ordered process – eligible for parole review after serving 50% of sentence	2 years
Proposition 57 – eligible for parole review after serving longest sentence imposed that is not an enhancement or alternative sentence	2 years

Example 2: Significant Difference in Minimum Time to Serve

Convictions and Enhancements	Sentence
PC 246.3(a) discharge of firearm with gross negligence	2 years
Alternative sentence: term doubled as a second strike	2 years
Enhancement: PC 667(a) prior serious felony	5 years
Enhancement: PC 667(a) prior serious felony	5 years
PC 243(d) battery	1 year
Enhancement: PC 667(a) prior serious felony	5 years
Total Sentence	20 years
Parole Eligibility	**Time to Serve**
Court-ordered process – eligible for parole review after serving 50% of sentence	10 years
Proposition 57 – eligible for parole review after serving longest sentence imposed that is not an enhancement or alternative sentence	2 years

As a result, when Proposition 57 was first implemented, many people eligible for parole review had more recent criminality (i.e., they were eligible for parole consideration earlier in their term, prior to serving 50 percent of their sentence) and many had more criminality (i.e., more convictions) than those who were eligible under the court-ordered process.

In addition, expanded credit earning under Proposition 57 went into effect in **August of 2017**. This means that persons who behave well and engage in

rehabilitative programming in prison and who are serving the shortest sentences for nonviolent offenses are now often released "on the natural" based on the sentence imposed by the court and their credit earning rather than being referred to the Board for parole consideration, as they were under the court-ordered process. Only persons serving longer sentences for nonviolent offenses or persons whose release dates have been extended as a result of rules violations are incarcerated long enough to be considered for parole by the Board under Proposition 57.

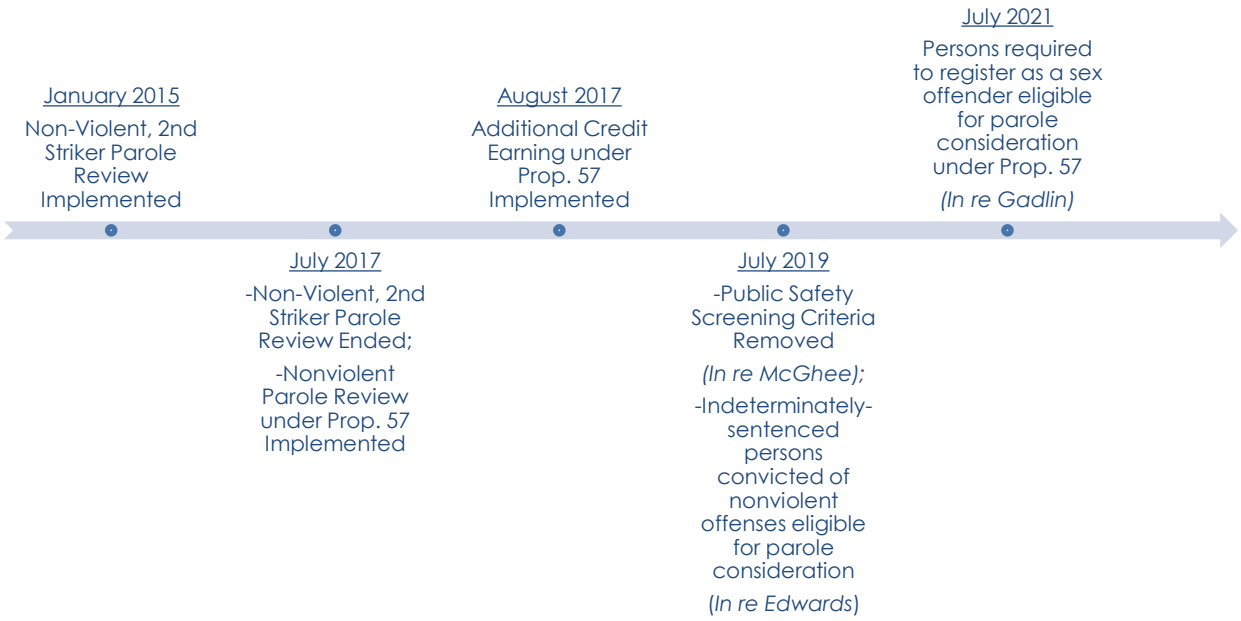
Lastly, as initially enacted, the Proposition 57 nonviolent parole review process excluded persons required to register as a sex offender and eligible persons had to pass the same safety screening criteria used for the court-ordered process to be referred to the Board for parole consideration.

Expansion of Proposition 57 by Case Law

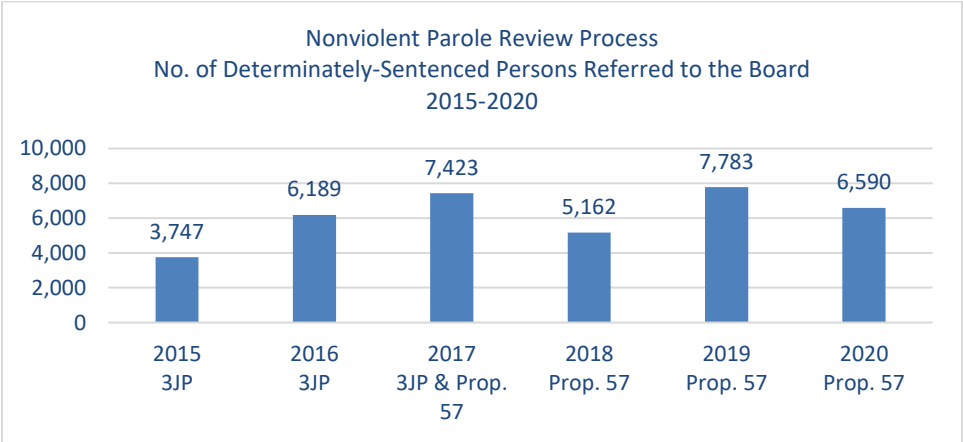
As mentioned above, the nonviolent parole review process under Proposition 57 has been the subject of significant litigation, which has further expanded the number of persons eligible for parole consideration. For example, in **July 2019**, CDCR removed the public safety screening criteria in response to the First Appellate District Court of Appeal's decision in *In re McGhee* and indeterminately-sentenced persons convicted of nonviolent offenses became eligible for parole consideration as a result of the Second District Court of Appeal's decision in *In re Edwards*.[7] Lastly, persons convicted of nonviolent offenses who are required to register as a sex offender are now eligible for parole consideration under the California Supreme Court's decision in *In re Gadlin*.[8]

[7] *In re McGhee* (2019) 34 Cal.App.5th 902; *In re Edwards* (2018) 26 Cal. App. 5th 1181.
[8] *In re Gadlin* (2020) 10 Cal.5th 915; emergency regulations implementing the *Gadlin* decision were promulgated in April 2021, and all persons who became eligible for parole consideration as a result of the *Gadlin* decision and who otherwise meet the eligibility requirements for parole consideration under Proposition 57 were referred to the Board by July 1, 2021. (Cal. Code Regs., tit. 15, § 2449.32, subd. (c).)

Below is a timeline of significant events associated with the nonviolent parole review process.

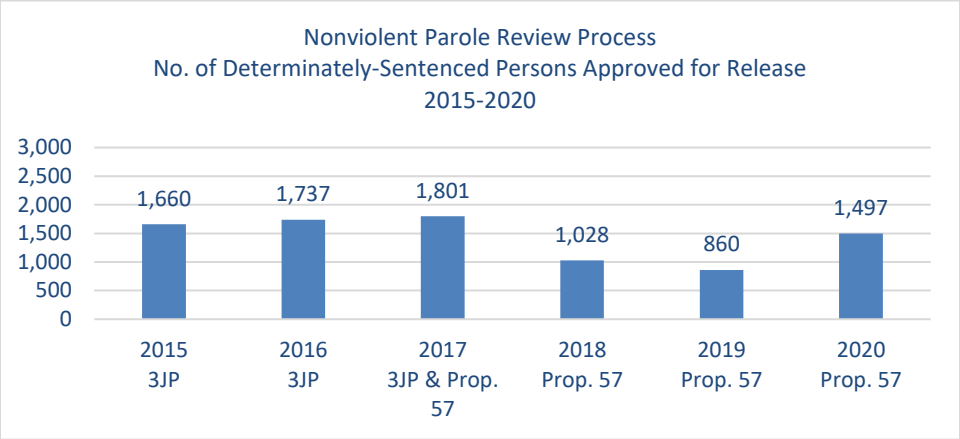


As a result of the significant changes in the law governing the nonviolent parole review process described above, the number of determinately-sentenced persons referred to the Board and the number approved for release has varied annually since 2015:[9]

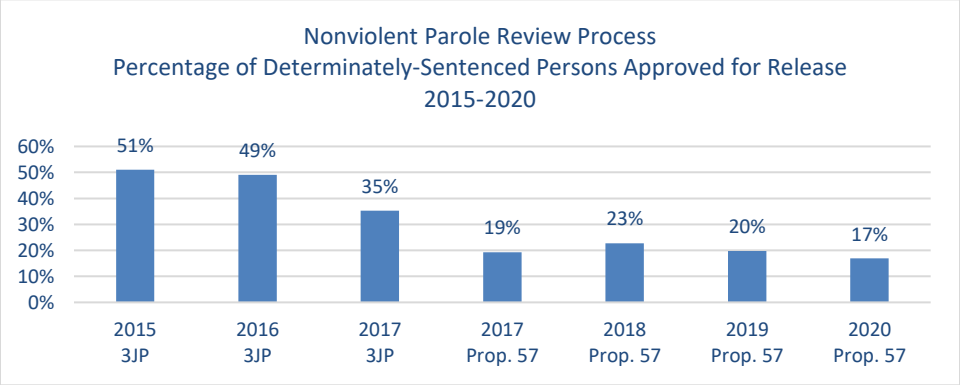


[9] The number of persons referred to the Board each year differs from the number of decisions rendered each year, due to a variety of factors, including delay between the date a person is referred and the date a decision is rendered to allow the incarcerated person, registered victims, and prosecuting agency to be notified and provide an opportunity to submit written statements for the Board's consideration.

The number of determinately-sentenced persons approved for release has also varied annually from a high of 1,801 in 2017 to a low of 860 in 2019:



The percentage of determinately-sentenced persons approved for release has varied from a high of 51 percent in 2015 for nonviolent, non-sex registrant, second-strikers who had served at least 50 percent of their term with no recent rules violations under the court-ordered process to a low of 17 percent for persons convicted of nonviolent offenses who served the full term for their primary offense regardless of their recent in-prison behavior, and who were not otherwise released "on the natural" with increased credit earning under Proposition 57 in 2020.



The Board has found that each time parole eligibility is quickly expanded, the initial impact is that incarcerated people are considered for parole who were not expecting it. Often persons are considered for parole who have not had the opportunity or incentive to actively engage in rehabilitative programming. However, as eligibility criteria stabilizes and more people are determined to be eligible for parole consideration upon admission to CDCR, more people are expected to actively participate in rehabilitative programming earlier in their incarceration and the number of people approved for release increases.

Procedural Overview

This section provides a more detailed explanation of the administrative procedures and timelines associated with the Proposition 57 nonviolent parole review process for determinately-sentenced persons. As mentioned above, determinately-sentenced persons convicted of nonviolent offenses are eligible for parole consideration under Proposition 57 once they have served the full term of their primary offense. Proposition 57 defines primary term as "the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence."[10]

A **Nonviolent Parole Eligible Date (NPED)** is the date on which the person is first eligible for parole consideration. Within 60 days of admission to prison, Case Records staff determine a person's eligibility for parole consideration and if eligible, calculate the person's NPED. An NPED is calculated by first identifying the longest term of imprisonment that is not an enhancement or alternative sentence and then subtracting any days the person has spent in custody prior to admission to CDCR.[11] Eligibility determinations and NPED calculations are served on the incarcerated person within 15 days and are subject to CDCR's administrative appeal process to address any alleged errors.[12]

A person is referred to the Board for parole consideration 35 days prior to their NPED so long as they have at least six months remaining to serve on their sentence and they are not, or will not within a year, be eligible for a parole consideration hearing as a determinately-sentenced youth offender or as a determinately-sentenced person eligible for a parole hearing under elderly parole.[13] If the person is not approved for release, they are eligible for review and possible referral to the Board again annually.[14] When a person is referred for parole consideration, they are served with a Notice of Rights explaining the process, including the opportunity to submit a written statement to be considered by the Board.[15]

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[10] Cal. Const., art. I, § 32, subd. (a), par. (1).
[11] Cal. Code Regs., tit. 15, § 3490, subd. (f).
[12] Cal. Code Regs., tit. 15, § 3491, subds. (f), (g).
[13] Cal. Code Regs., tit. 15, § 3492, subd. (a); determinately-sentenced persons who were under the age of 26 at the time of their offense are eligible for a parole consideration hearing as a youth offender once they have served 15 years of incarceration and determinately-sentenced persons who are age 50 and who have served 20 years are eligible for a parole consideration hearing under elderly parole, exceptions apply. (See, Pen. Code, §§ 3051, 3055).
[14] Cal. Code Regs., tit. 15, § 3492, subd. (b).
[15] Cal. Code Regs., tit. 15, § 3492, subd. (c).

Below is a timeline of procedures once a determinately-sentenced person is referred for parole consideration under Proposition 57.[16]

Timeline	Action
Within 5 days of referral	Notification sent to registered victims and prosecuting agency
35 days after notices sent	Written responses to notices due
Within 30 days of deadline for written responses	Deputy commissioner conducts a jurisdictional review and, if jurisdiction is confirmed, conducts a review on the merits and issues a written decision
Within 15 days of decision	Decision served on the incarcerated person and sent to registered victims and prosecuting agency
Within 30 days of being served decision	Incarcerated person may appeal the decision
Within 30 days of appeal received	Original decision reviewed and decision rendered concurring with, or overturning, the prior decision; decision served on the incarcerated person and sent to registered victims and prosecuting attorney within 15 days
60 days following decision	If person was approved for release, person is released
One year after prior referral	If person was denied release, person is again reviewed for referral to the Board for parole consideration

Release Decisions

The Board's deputy commissioners are responsible for reviewing determinately-sentenced persons for discretionary release under Proposition 57. The Board's deputy commissioners are experienced attorneys and their civil service classification is administrative law judge. The Board employs about 50 administrative law judges.

Deputy commissioners come from a wide variety of professional backgrounds and experience. Many have private practice experience in family law, criminal defense, immigration, workers' compensation, and taxation. Others have experience in the public sector as public defenders and prosecutors. Some have experience working with nonprofit entities, and in juvenile dependency proceedings. Lastly, a few have experience as a judge or judge pro tem or served in the military, and one has experience in law enforcement.

[16] See, Cal. Code Regs., tit. 15, §§ 2449.1 - 2449.7; Cal. Code Regs., tit. 15, § 3492.

New deputy commissioners receive a minimum of eight weeks of training, and all their decisions are monitored and reviewed for the first six to eight months, followed by periodic review thereafter. In addition, deputy commissioners receive continuing education monthly. Training topics for deputy commissioners include the law governing the Board's decisions, risk assessment, correctional policies and procedures, disabilities and reasonable accommodations under the Americans with Disabilities Act, ethics, implicit bias, and structured decision-making.

In addition to conducting nonviolent parole reviews under Proposition 57, deputy commissioners also serve on hearing panels with commissioners for parole suitability hearings (i.e., parole hearings for persons serving life with the possibility of parole, youth offenders, elderly parole, and medical parole). They also conduct annual and certification hearings under Penal Code section 2960 et seq. for persons with mental health disorders, review parolees for discharge from supervised release, and adjudicate a variety of pre-hearing matters for the Board's parole hearing process.

When conducting a nonviolent parole review under Proposition 57, deputy commissioners must review and consider all relevant and reliable information, including:

- information contained in the incarcerated person's central file, including their California Static Risk Assessment score;
- the person's criminal history;
- any return to prison with a new conviction after previously being approved for release under Proposition 57; and
- written statements by the incarcerated person, registered victims, and the prosecuting agency.[17]

Incarcerated persons are approved for release if they do not pose a current, unreasonable risk of violence or a current unreasonable risk of significant criminal activity.[18] Deputy commissioners are required to evaluate specific risk factors concerning the person's current conviction(s), prior criminal behavior, institutional behavior, work history, and rehabilitative programming. The Board's regulations list specific evidence-based factors that aggravate or mitigate the person's risk. For example, crimes in which a person personally used a deadly weapon aggravate the person's risk, whereas crimes that do not involve personal use of a deadly weapon mitigate the person's risk.[19]

[17] Cal. Code Regs., tit. 15, § 2449.4, subd. (b).
[18] Cal. Code Regs., tit. 15, § 2449.4, subd. (f).
[19] Cal. Code Regs., tit. 15 § 2449.5, subds. (b)-(g).

Deputy commissioners render a decision based on the totality of the circumstances.[20] Incarcerated persons shall be approved for release if factors aggravating their risk do not exist or if they are outweighed by factors mitigating their risk. Deputy commissioners must also take into account the relevance of the information based on the passage of time, the person's age, and the person's physical and cognitive limitations, if any.[21] Decisions are rendered in writing and must include a statement of reasons supporting the decision.[22] Decisions approving a person for release two or more years prior to the end of their term must be reviewed and approved by a supervising deputy commissioner.[23]

Incarcerated persons may request review of a Board decision within 30 calendar days of being served the decision.[24] In addition, the Board may at any time prior to a person's release, review its decision if the decision contained an error of law, an error of fact, or if the Board receives new information that would have materially impacted the previous decision had it been known at the time the decision was issued.[25] A deputy commissioner not involved in the original decision will review the decision within 30 days and determine whether to concur with the original decision or overturn it.[26] The resulting written decision must be supported by a statement of reasons.[27] The incarcerated person, registered victims, and prosecutors are notified of the outcome.[28]

Persons approved for release are released 60 days from the date of the Board's decision and persons denied release are reviewed again annually until they are either approved for release by the Board, they are released "on the natural" based on the sentence imposed by the court, or they become eligible for a parole consideration hearing as a determinately-sentenced youth offender or under elderly parole.[29]

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[20] *Id*.
[21] Cal. Code Regs., tit. 15, § 2449.5, subd. (a).
[22] Cal. Code Regs., tit. 15, § 2449.4, subd. (d).
[23] Cal. Code Regs., tit. 15, § 2449.4, subd. (f).
[24] Cal. Code Regs., tit. 15, § 2449.7, subd. (a).
[25] Cal. Code Regs., tit. 15, § 2449.7, subd. (b).
[26] Cal. Code Regs., tit. 15, § 2449.7, subd. (d).
[27] *Id*.
[28] Cal. Code Regs., tit. 15, § 2449.7, subds. (e), (f).
[29] Cal. Code Regs., tit. 15, §§ 3491-3493.

DATA REGARDING DETERMINATELY-SENTENCED PERSONS

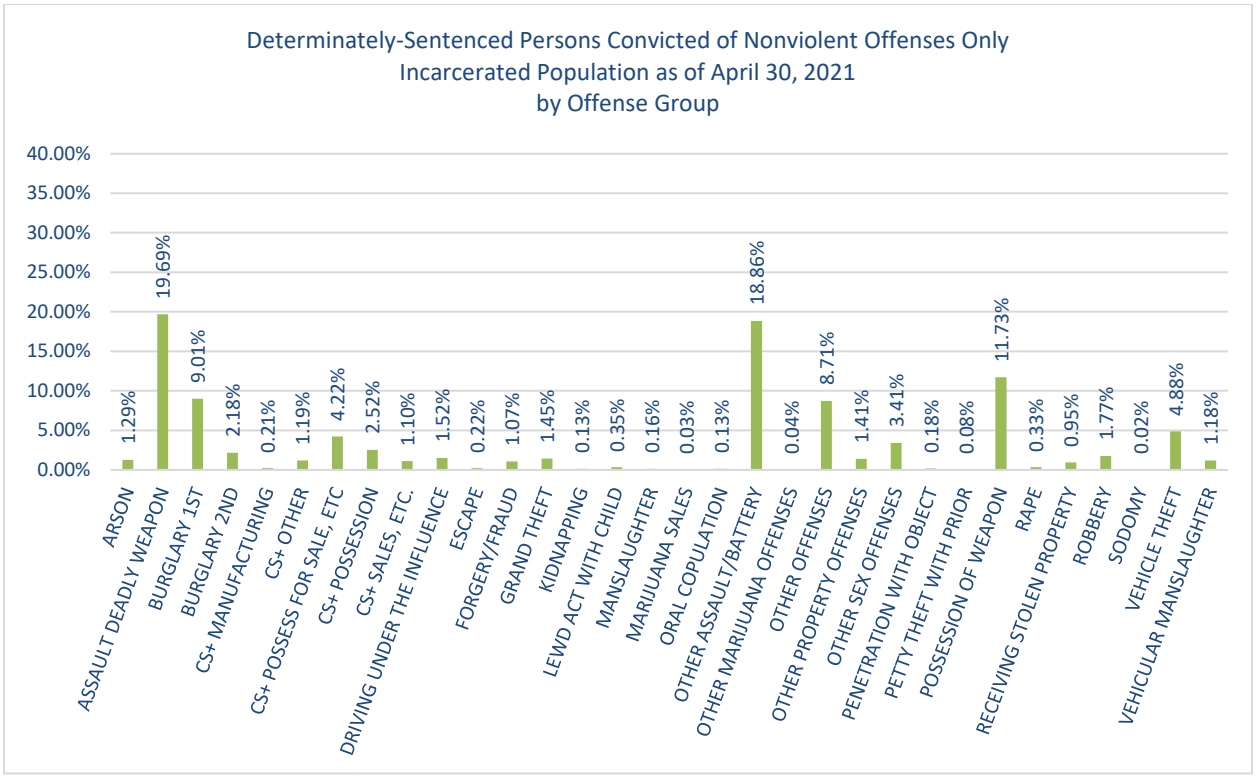
The following data was requested by the Committee on Revision of the Penal Code. Specifically, the committee requested information concerning the type of commitment offenses, total length of sentence, length of time between admission date and NPED, and length of time between NPED and Earliest Possible Release Date (EPRD)[30] for the following determinately-sentenced populations:

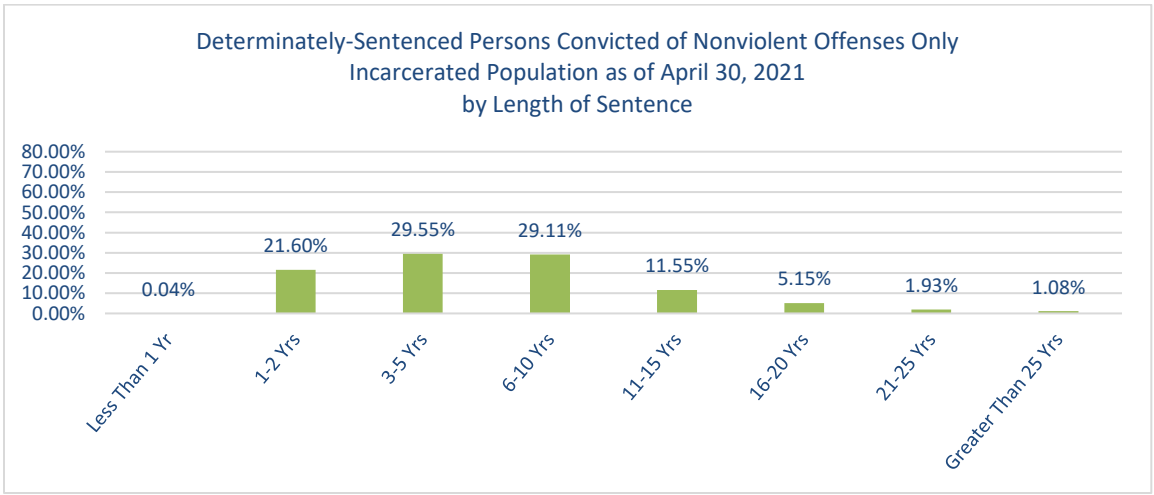
- person's convicted of nonviolent offenses only;
- person's conviction of nonviolent offenses and at least one violent felony; and,
- person's convicted of only violent offenses.

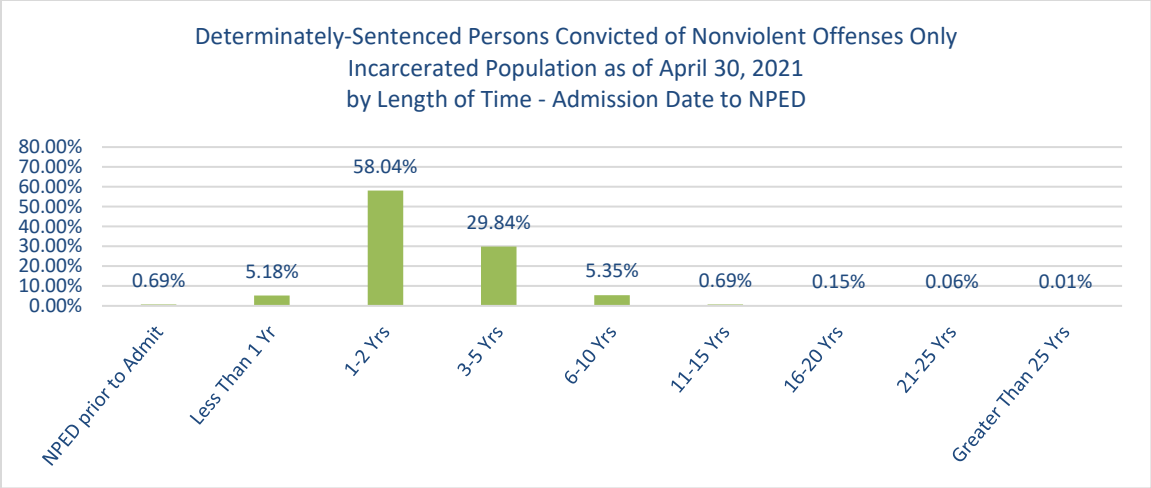
Persons Convicted of Nonviolent Offenses Only

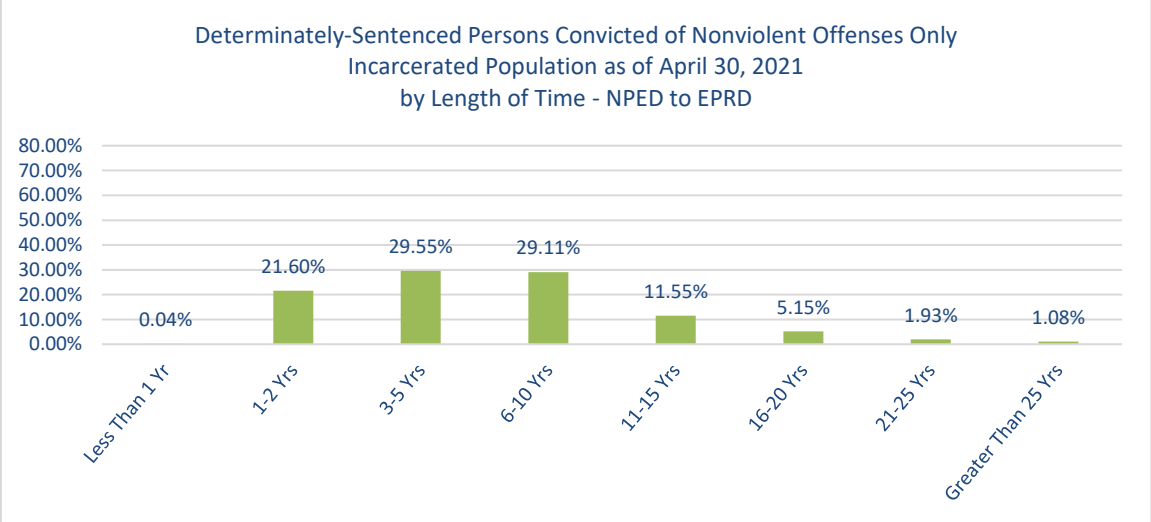
The data below is based on 19,566 incarcerated persons serving sentences for nonviolent felonies only as of April 30, 2021. This population is currently eligible for referral to the Board for parole consideration under Proposition 57 if they have at least six months remaining to serve and they are not eligible for the Board's parole hearing process. Please note that some offenses listed are a violent felony under Penal Code section 667.5, subdivision (c) today, but they were not at the time the crime was committed so they are considered nonviolent for purposes of the Proposition 57 nonviolent parole review process (i.e., robbery, kidnapping, etc.) Also, many incarcerated persons have multiple convictions and sentencing enhancements. For purposes of this data, only the person's controlling offense is listed, which is usually the most serious offense; it is the offense that will keep them in prison the longest, excluding sentencing enhancements.

[30] An EPRD is the date a determinately-sentenced person will be released "on the natural" based on the sentence imposed by the court, less any applicable credits (i.e., pre-sentence, good conduct, educational milestone, rehabilitative achievement, etc.)


Determinately-Sentenced Persons Convicted of Nonviolent Offenses Only
Incarcerated Population as of April 30, 2021
by Offense Group
40.00%
35.00%
30.00%
25.00%
20.00%
15.00%
10.00%
5.00%
0.00%
1.29%
19.69%
9.01%
2.18%
0.21%
1.19%
4.22%
2.52%
1.10%
1.52%
0.22%
1.07%
1.45%
0.13%
0.35%
0.16%
0.03%
0.13%
18.86%
0.04%
8.71%
1.41%
3.41%
0.18%
0.08%
11.73%
0.33%
0.95%
1.77%
0.02%
4.88%
1.18%
ARSON
ASSAULT DEADLY WEAPON
BURGLARY 1ST
BURGLARY 2ND
CS+ MANUFACTURING
CS+ OTHER
CS+ POSSESS FOR SALE, ETC
CS+ POSSESSION
CS+ SALES, ETC.
DRIVING UNDER THE INFLUENCE
ESCAPE
FORGERY/FRAUD
GRAND THEFT
KIDNAPPING
LEWD ACT WITH CHILD
MANSLAUGHTER
MARIJUANA SALES
ORAL COPULATION
OTHER ASSAULT/BATTERY
OTHER MARIJUANA OFFENSES
OTHER OFFENSES
OTHER PROPERTY OFFENSES
OTHER SEX OFFENSES
PENETRATION WITH OBJECT
PETTY THEFT WITH PRIOR
POSSESSION OF WEAPON
RAPE
RECEIVING STOLEN PROPERTY
ROBBERY
SODOMY
VEHICLE THEFT
VEHICULAR MANSLAUGHTER


Determinately-Sentenced Persons Convicted of Nonviolent Offenses Only
Incarcerated Population as of April 30, 2021
by Length of Sentence
80.00%
70.00%
60.00%
50.00%
40.00%
30.00%
20.00%
10.00%
0.00%
0.04%
21.60%
29.55%
29.11%
11.55%
5.15%
1.93%
1.08%
Less Than 1 Yr
1-2 Yrs
3-5 Yrs
6-10 Yrs
11-15 Yrs
16-20 Yrs
21-25 Yrs
Greater Than 25 Yrs

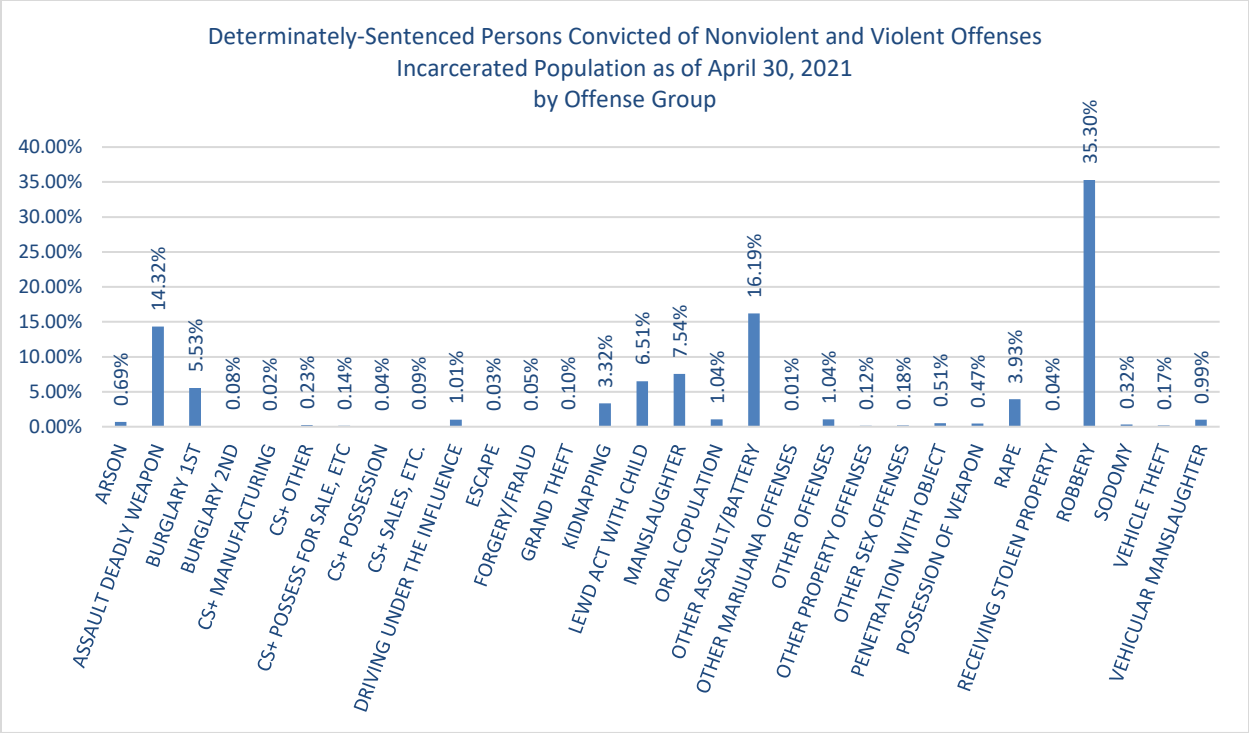


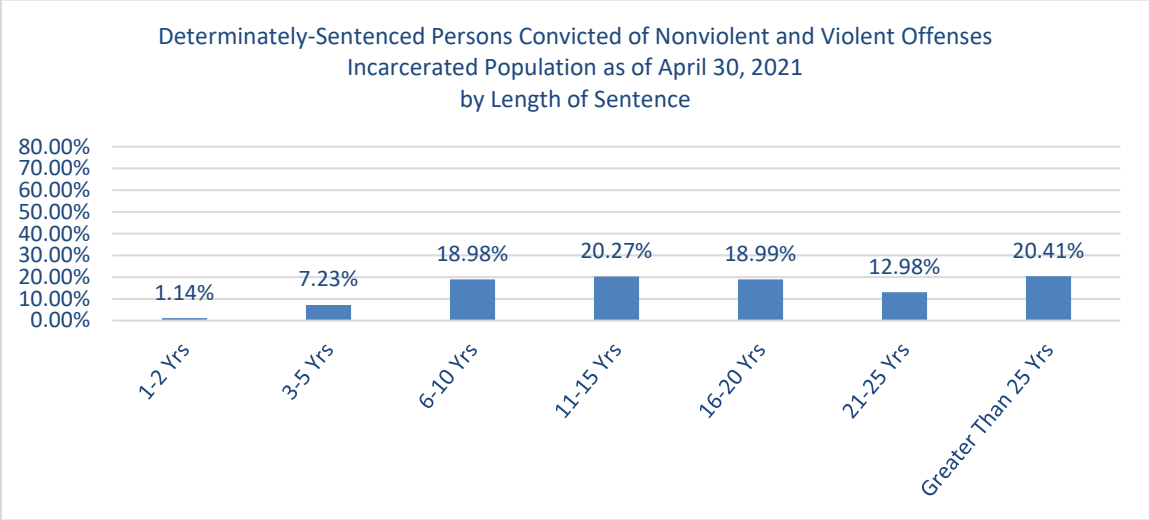


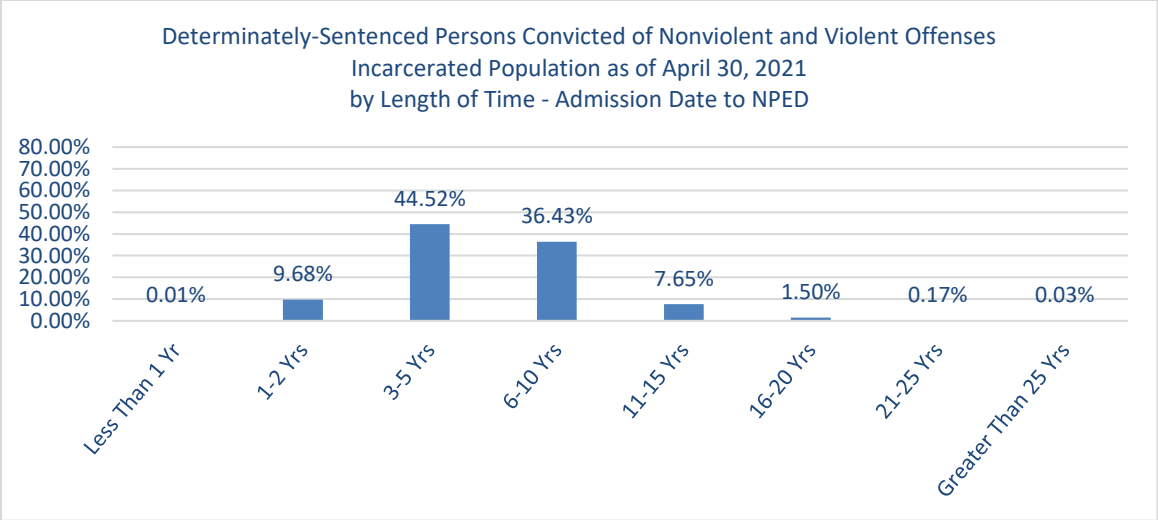
Persons Convicted of both Nonviolent and Violent Offenses

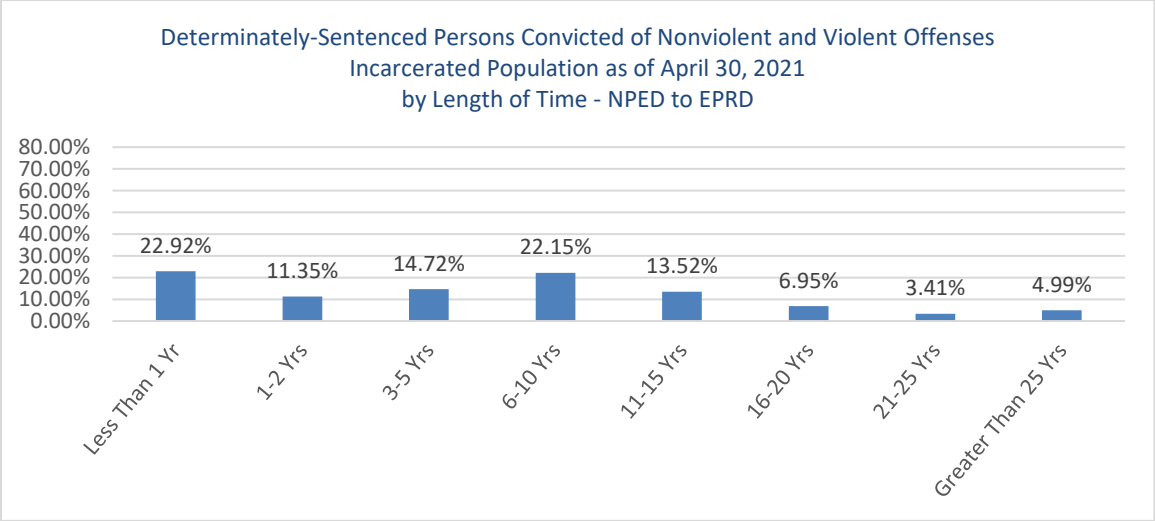
The data below is based on 18,565 incarcerated persons serving sentences for both nonviolent and violent felonies as of April 30, 2021. This population is not eligible for parole consideration under Proposition 57. The NPEDs for this population are estimates based on available electronic sentencing information.

Also, many incarcerated persons have multiple convictions and sentencing enhancements. For purposes of this data, only the person's controlling offense is listed, which is usually the most serious offense; it is the offense that will keep them in prison the longest, excluding sentencing enhancements. As a result, a person's controlling offense may be nonviolent but they may also have a shorter sentence for a violent felony conviction. In those cases, only the nonviolent offense would be included in the chart below.


Determinately-Sentenced Persons Convicted of Nonviolent and Violent Offenses
Incarcerated Population as of April 30, 2021
by Offense Group
40.00%
35.00%
30.00%
25.00%
20.00%
15.00%
10.00%
5.00%
0.00%
0.69%
14.32%
5.53%
0.08%
0.02%
0.23%
0.14%
0.04%
0.09%
1.01%
0.03%
0.05%
0.10%
3.32%
6.51%
7.54%
1.04%
16.19%
0.01%
1.04%
0.12%
0.18%
0.51%
0.47%
3.93%
0.04%
35.30%
0.32%
0.17%
0.99%
ARSON
ASSAULT DEADLY WEAPON
BURGLARY 1ST
BURGLARY 2ND
CS+ MANUFACTURING
CS+ OTHER
CS+ POSSESS FOR SALE, ETC
CS+ POSSESSION
CS+ SALES, ETC.
DRIVING UNDER THE INFLUENCE
ESCAPE
FORGERY/FRAUD
GRAND THEFT
KIDNAPPING
LEWD ACT WITH CHILD
MANSLAUGHTER
ORAL COPULATION
OTHER ASSAULT/BATTERY
OTHER MARIJUANA OFFENSES
OTHER OFFENSES
OTHER PROPERTY OFFENSES
OTHER SEX OFFENSES
PENETRATION WITH OBJECT
POSSESSION OF WEAPON
RAPE
RECEIVING STOLEN PROPERTY
ROBBERY
SODOMY
VEHICLE THEFT
VEHICULAR MANSLAUGHTER


Determinately-Sentenced Persons Convicted of Nonviolent and Violent Offenses
Incarcerated Population as of April 30, 2021
by Length of Sentence
80.00%
70.00%
60.00%
50.00%
40.00%
30.00%
20.00%
10.00%
0.00%
1.14%
7.23%
18.98%
20.27%
18.99%
12.98%
20.41%
1-2 Yrs
3-5 Yrs
6-10 Yrs
11-15 Yrs
16-20 Yrs
21-25 Yrs
Greater Than 25 Yrs





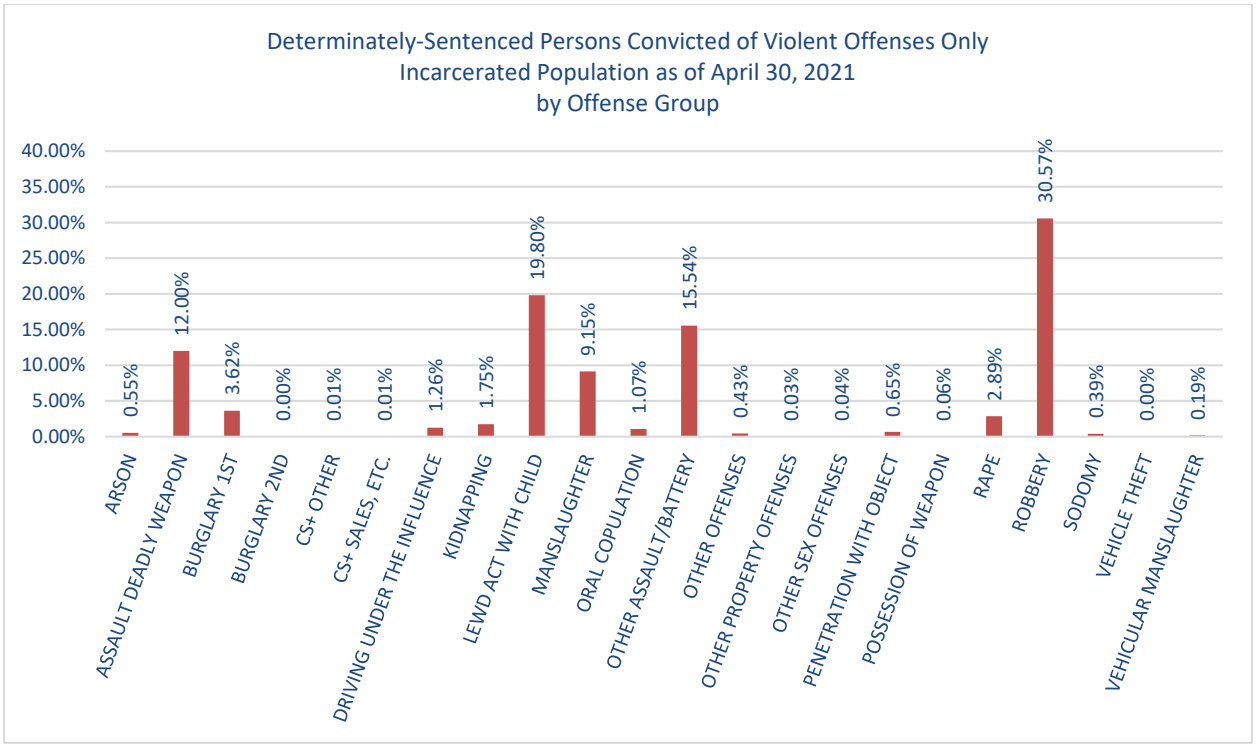
Persons Convicted of Violent Offenses Only

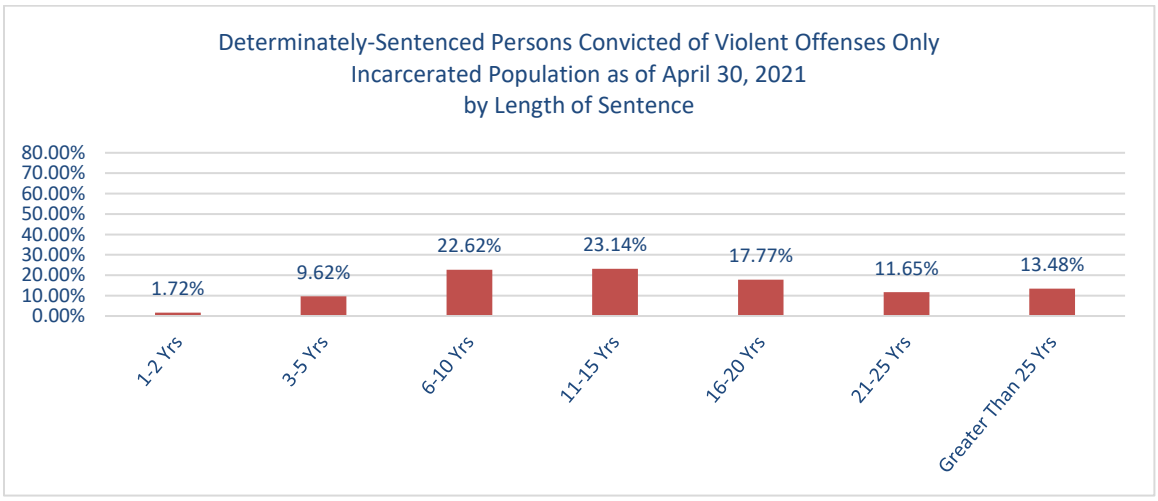
The data below is based on 23,478 incarcerated persons serving determinate sentences for violent offenses only as of April 30, 2021. This population is not eligible for parole consideration under Proposition 57.

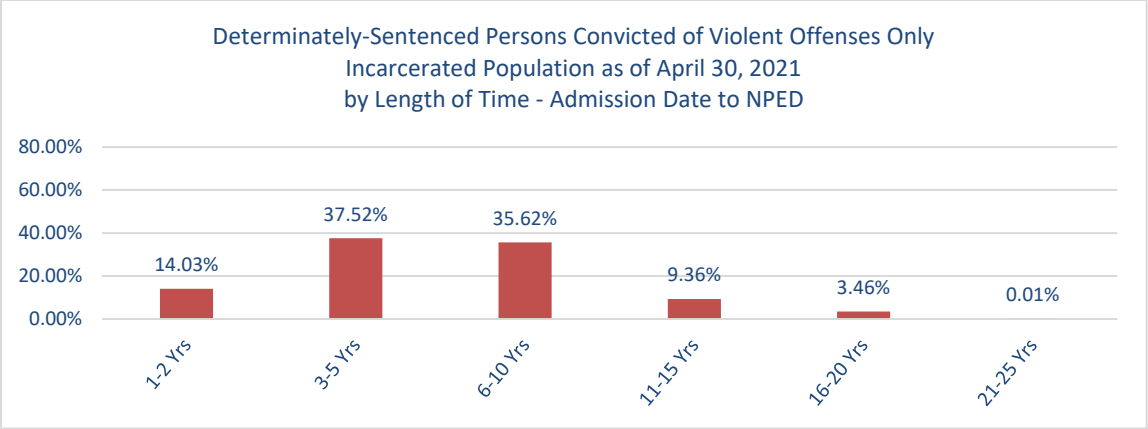
The NPEDs for this population are estimates based on available electronic sentencing information. Also, many incarcerated persons have multiple convictions and sentencing enhancements. For purposes of this data, only the person's controlling offense is listed, which is usually the most serious offense; it is the offense that will keep them in prison the longest, excluding sentencing enhancements.

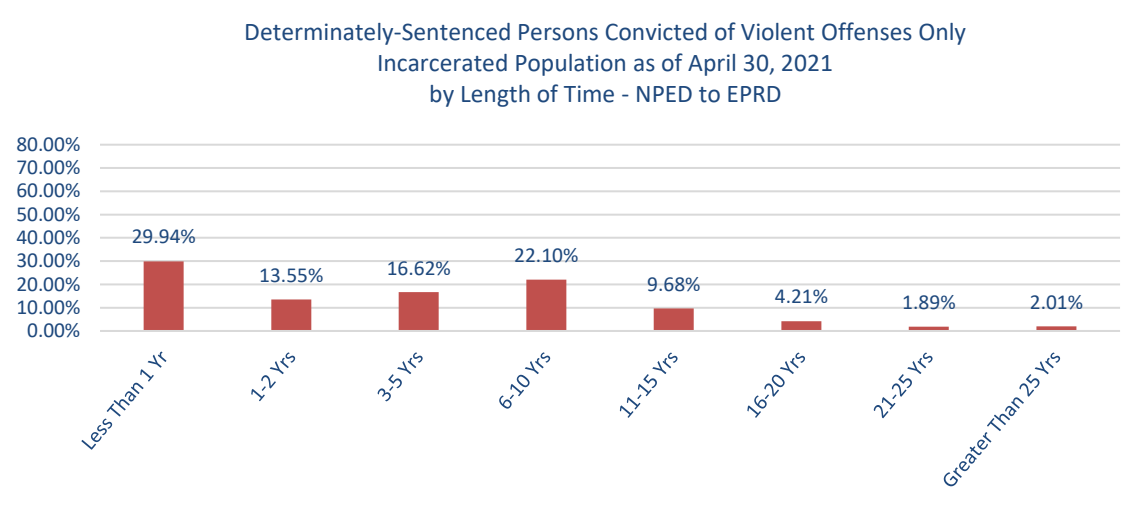
Lastly, a person who is convicted of a nonviolent offense with a violent sentencing enhancement is considered to be sentenced to a violent

felony. In essence, the violent felony enhancement makes the underlying offense a violent felony under Penal Code section 667.5, subdivision (c). As a result, some crimes listed below appear to be nonviolent, but because of a violent sentencing enhancement, they are included here because they are the person's controlling offense – the term that will keep the person in prison the longest, excluding sentencing enhancements.









Indeterminately-Sentenced Persons Convicted of Nonviolent Offenses

As stated above, indeterminately-sentenced persons convicted of nonviolent offenses became eligible for parole consideration under Proposition 57 as a result of the Second District Court of Appeal's decision in *In re Edwards*.[31] The majority of indeterminately-sentenced persons eligible for parole consideration under Proposition 57 are nonviolent third strikers. Like determinately-sentenced persons sentenced to nonviolent offenses who are eligible for parole consideration under Proposition 57, indeterminately-sentenced persons convicted of nonviolent offenses are eligible for parole consideration once they have served the full term of their primary offense.

Determining someone's primary term is, however, more complicated for persons sentenced to a life term under the Three Strikes Law. This is because

[31] *In re Edwards* (2018) 26 Cal.App.5th 1181.

the person is not sentenced to the term prescribed by the code section that was violated. Rather, the person receives an alternative sentence of 25 years to life. For example, a person convicted of assault with a deadly weapon (other than a firearm) under Penal Code section 245(a)(1) would ordinarily be sentenced to a term of two, three, or four years. However, if it is the person's third strike, the person receives an alternative sentence of 25 years to life. The person's Abstract of Judgment issued by the court reflects only the 25-years-to-life sentence without reference to the term of two, three, or four years for the underlying offense.

As a reminder, Proposition 57 states that all persons convicted of a nonviolent offense are eligible for parole consideration once they serve the full term of their primary offense, which is defined as the longest term of imprisonment imposed by the court, excluding the imposition of an enhancement, consecutive sentence, *or alternative sentence*.[32]

This provision was initially interpreted as excluding nonviolent third strikers because the only sentence imposed by the court for the underlying nonviolent offense is an alternative sentence of 25 years to life. The court in *Edwards* disagreed and held that indeterminately-sentenced persons convicted of nonviolent offenses are eligible for parole consideration under Proposition 57. The court further held that for purposes of determining the person's primary offense under Proposition 57, CDCR must look to the aggravated term for the underlying nonviolent offense. In the example above, the aggravated term for a conviction under Penal Code section 245(a)(1) is four years. Thus, a person sentenced to a third strike for violating Penal Code section 245(a)(1) would be eligible for parole consideration under Proposition 57 after serving four years (assuming they had no other convictions for which they were sentenced to a longer term, excluding enhancements). In addition, persons required to register as a sex offender were initially excluded.

The CDCR implemented the *Edwards* decision via emergency regulations in December 2018.[33] Under the regulations, incarcerated persons are screened for eligibility and if eligible, an NPED is calculated, using the same process as though they were determinately-sentenced.[34] Once referred to the Board, however, they are scheduled for a full parole suitability hearing like other persons serving life terms; they are not reviewed using the same

[32] Cal. Const., art. I, § 32, subd. (a), par. (1).
[33] Cal. Code Regs., tit. 15, §§ 3495-3497, 2449.30-2449.34.
[34] Cal. Code Regs., tit. 15, §§ 3495-3496.

"paper review" process that is used for determinately-sentenced persons considered for parole under Proposition 57.[35]

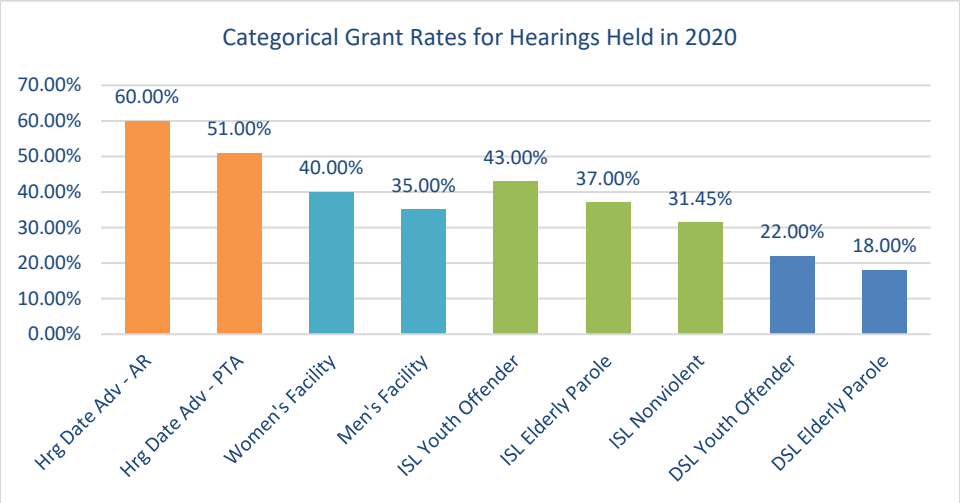
The parole hearing process for indeterminately-sentenced persons convicted of nonviolent offenses mirrors the Board's parole hearing process for persons serving life-terms, youth offenders, and elderly parole with one exception: when a nonviolent indeterminately-sentenced person is referred to the Board for parole consideration under Proposition 57, the Board conducts a jurisdictional review to confirm the person is eligible for parole consideration under Proposition 57.[36] All other law and procedures governing parole suitability hearings apply. For more information about the parole suitability hearing process, please see *Discretionary Parole in California, Report for the Committee on Revision on the Penal Code* (November 2020).[37]

The *Edwards* decision resulted in about 2,600 indeterminately sentenced persons being immediately eligible for a parole hearing. Under the regulations, persons who were within five years of their initial parole hearing date and who had served at least 20 years were given priority; the Board was required to schedule them for a hearing by no later than December 2020.[38] All others who were immediately eligible for a hearing must be scheduled for a hearing by the end of 2021.[39]

As of May 30, 2021, the Board has scheduled 1,898 parole hearings for indeterminately-sentenced persons convicted of nonviolent offenses since the *Edwards* decision was implemented. Of those hearings, 872 were held, resulting in 262 grants of parole and 610 denial. An additional 72 hearings resulted in a stipulation to unsuitability, and 955 were postponed, waived by the incarcerated person, continued, or cancelled. The remaining eligible persons will be scheduled for a hearing by the end of 2021, as required and persons whose hearings were initially postponed are automatically rescheduled for the next available calendar.

[35] Cal. Code Regs., tit. 15, § 3497, subd. (b).
[36] Cal. Code Regs., tit. 15, § 2449.31.
[37] http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-15s1.pdf
[38] Cal. Code Regs., tit. 15, § 2449.32, subd. (b).
[39] *Id*.

The grant rate for indeterminately-sentenced persons convicted of nonviolent offenses who had hearings in 2020 was 31.45 percent, whereas the grant rate for all persons who had hearings in 2020 was 35.65 percent. For comparison purposes, the following chart provides the Board's grant rates in 2020, broken down by a variety of factors:



Notes: "Hrg Date Adv – AR" and "Hrg Date Adv – PTA" are hearings for which the Board advanced the person's hearing date on its own motion or in response to a petition filed by the person; ISL refers to indeterminately-sentenced persons; DSL refers to determinately-sentenced persons.

Lastly and as mentioned above, the California Supreme Court held in December 2020 that persons convicted of nonviolent offenses who are required to register as a sex offender are eligible for parole consideration (*In re Gadlin*).[40] The *Gadlin* decision applies to indeterminately-sentenced persons as well. Emergency regulations implementing the *Gadlin* decision were promulgated in April 2021, and all persons who became eligible for parole consideration as a result of the *Gadlin* decision and who otherwise meet the eligibility requirements for parole consideration under Proposition 57 were referred to the Board by July 1, 2021 and must be scheduled for a hearing by no later than December 2022.[41] It is estimated about 700 indeterminately-sentenced persons will need to be scheduled for a hearing by the end of 2022 as a result of the *Gadlin* decision.

[40] *In re Gadlin* (2020) 10 Cal.5th 915.
[41] Cal. Code Regs., tit. 15, § 2449.32, subd. (c).

Proposition 57 Nonviolent Parole Review Litigation

As previously mentioned, several issues concerning the Proposition 57 nonviolent parole review process have been the subject of litigation. Below is a summary of some of the significant issues recently addressed or currently pending before the courts.

Issue: Can Incarcerated Persons Be Excluded from Nonviolent Parole Consideration Based on Past or Current Sex Offenses?

Resolved by California Supreme Court, December 2020. *In re Gadlin*; (2020) 10 Cal.5th 915. The Court held CDCR's regulations cannot exclude persons for any prior conviction because Proposition 57's text indicates that parole eligibility is based solely on the person's current offenses. The Court also held the regulations cannot exclude people for a current offense not defined by the regulations as a violent felony. The Court directed CDCR to treat as void and repeal title 15, sections 3491, subdivision (b)(3) and 3496, subdivision (b) and to make any necessary conforming changes to the regulations.

Issue: Should Persons Convicted of Both Violent and Nonviolent Offenses Be Considered for Nonviolent Parole?

Pending in the California Supreme Court. *In re Mohammad;* No. S259999. Proposition 57 amended the California Constitution to provide for early parole consideration for persons convicted of nonviolent felonies. The question presented: Does the text of Proposition 57 preclude consideration of the ballot materials to discern the voters' intent and prohibit CDCR from enacting implementing regulations that exclude persons who stand convicted of both nonviolent and violent felonies from early parole consideration?

Issue: Should Credits Be Applied Toward a Nonviolent Parole Eligible Date?

Resolved in the Third District Court of Appeal, November 2020. *In re Canady*; (2020) 57 Cal.App.5th 1022. The court held that the constitutional amendment providing that a person shall be eligible for parole consideration after serving the "full term for the primary offense" refers to the sentence imposed by the court without including conduct credits.

Issue: Does a Paper Review Process for Determinately-Sentenced Persons Convicted of Nonviolent Offenses Satisfy the Constitution?

Resolved in Fourth District Court of Appeal, February 2021. *In re Kavanaugh*; (2021) 61 Cal.App.5th 320. The court concluded that nonviolent parole regulations providing a paper review process for determinately-sentenced persons is consistent with article I, section 32 of the constitution and does not violate procedural due process.

Pending in Third District Court of Appeal. *In re Flores*; No. C089974. At issue in this habeas appeal is whether determinately-sentenced persons convicted of

nonviolent offenses are entitled to the same process and protections provided to persons serving life with the possibility of parole under *In re Lawrence*, including the right to attend a live hearing.

Pending in the Fifth District Court of Appeal. *In re Ernst*; No. F08138. At issue in this habeas appeal is whether the nonviolent parole regulations providing a paper review process for determinately-sentenced persons is consistent with article I, section 32 of the constitution, and whether the process violates procedural due process.

Conclusion

The discretionary parole process for persons convicted of nonviolent offenses has undergone significant changes in the six years since the court-ordered process for nonviolent second strikers was implemented in 2015. More incarcerated people are eligible for the process (i.e., persons required to register as a sex offender, indeterminately-sentenced persons, etc.) and many are eligible earlier in their incarceration. However, credit earning has also been expanded and persons are now eligible for referral to the Board despite recent negative in-prison behavior. As a result, many people referred to the Board today have more recent and more serious criminality as well as recent serious rules violations. As a result, the percentage of persons approved for release annually has trended downward. However, as eligibility criteria stabilizes and persons are provided an incentive and the ability to engage in rehabilitative programming upon admission to CDCR, it is reasonable to expect approval rates will increase.

In the interim, the Board will continue to make the most informed decisions possible based on the law and relevant evidence-based research concerning risk and recidivism, while protecting the rights of all who appear before it. The Board will also continue to adapt to judicial interpretations of the law governing discretionary parole under Proposition 57.

Exhibit E

Marshall Thompson, Utah Board of Pardons and Parole

Brief Written Statement for the California Committee on the Revision of the Penal Code

Marshall Thompson
Vice Chair, Utah Board of Pardons and Parole

Utah uses an indeterminate sentencing structure accompanied by robust sentencing guidelines and broad constitutional powers for the Board of Pardons and Parole. When dealing with felonies, judges make a decision of whether to place a person on probation or to send the person to prison for an indeterminate period based on statutorily defined ranges. The Board of Pardons and Parole will then determine the length of the incarceration within the statutory range.

The best part of this system is that it allows for a more evidence-based criminal sentence that responds to positive and negative behavior while incarcerated, risk factors, individual needs, and treatment and programming accomplishments.

The great drawback is the lack of certainty about the release date that affects both the person who committed the crime, that person's family, and the victim of that crime.

To deal with this, Utah has extremely robust sentencing guidelines. While they are not mandatory, they are highly influential and drive the analysis as well as the scheduling of hearings. The Board also employs an evidence-based structured decision making model that creates greater consistency in results.

The Board does not generally track the rate at which we grant paroles and terminations from prison. It is our policy to always grant parole unless extraordinary circumstances make it unjustifiable. Even when we deny parole or order someone to serve the full statutory sentence, our rules allow us to reconsider that decision at a later date. The relevant information on grant rates, therefore, must look back at a cohort of people who terminated their sentences to see how many of them paroled or terminated before the statutory maximum.

Of all the people who terminated their sentences in FY 2021, 92.3 percent were paroled or terminated prior to the statutory maximum sentence. Most of the 7.7 percent who reached the maximum sentence were in the lower range of sentences, which include a class A misdemeanor with a maximum sentence of one year.

Our first degree felony has a range of five years to life. We currently have 140 individuals who the Board has ordered to serve their entire life sentence in prison. Many of these people, however, will still be released earlier based on a redetermination review or a compassionate release.

The current prison population in Utah is about 5,794 people. Our indeterminate sentencing system has also allowed us to effectively implement criminal justice reform policies to address over incarceration. Through statutory revisions, revisions to our sentencing guidelines, and

coordination between criminal justice agencies, Utah has reduced its prison population over the past six years to the level we were at in 2003 without any measurable detriment to public safety. This is particularly impressive considering that Utah already had one of the lowest incarceration rates in the country.

Exhibit F

Barbara Levine, Citizens Alliance on Prisons and Public Spending (Michigan)

Sentencing and Parole in Michigan

Submitted to the California Committee on Revision of the Penal Code, July 2021 by Barbara R. Levine, former executive director, Citizens Alliance on Prisons and Public Spending (CAPPS)

Michigan was and in many ways still is an archetype of what state criminal justice systems used to be like. It has indeterminate sentencing and has retained parole. A brief review of the evolution of both sentencing and parole over the decades will help place the current sentencing guidelines and parole guidelines schemes in context.

Sentencing Basics

- The penal code has never been systematically revamped. Instead there has been an accretion of legislative amendments that reflect the headline of the moment, pressure from a legislator's constituent, or more gradual shifts in public attitudes.
- It has mandatory life without parole for first-degree murder – but no death penalty, so resources in the criminal justice system don't get sucked up by death penalty cases.
- Commutations, which occurred regularly until the [70s], became rare. As a result, 10% of the prison population consists of aging first-degree lifers.
- The other major person crimes – primarily second-degree murder, assault with intent to murder, first-degree criminal sexual conduct (CSC 1) and armed robbery – carry penalties of life or any term, meaning the trial court can choose a sentence of parolable life or set both the minimum and maximum terms.
    - Until 1992 parolable lifers became eligible for release after 10 calendar years. In 1992 it became 15 years.
- Other crimes carry set statutory maximums, like five, ten, 15 or 20 years. An exception is possession or use of a firearm during the commission of a felony (felony firearm) which carries a mandatory determinate consecutive two-year term for a first offense and a five-year term for a second offense.
- Until 1972 there was virtually no chance to get the sheer length of a sentence reviewed on appeal. Some judges were imposing sentences that left virtually no room for parole board decision-making, like 9 yrs, 11 mos – 10 yrs. Then the MI SCt decided in *People v Tanner* that the minimum cannot exceed 2/3 of the maximum.
- Michigan had very tough mandatory sentences for delivery of large quantities of drugs, including mandatory life without parole for delivery of 650 grams. However Michigan never incarcerated many low-level drug users.
    - In 1999, 12.3% of state prisoners were serving for drug offenses.
    - In 2002, the drug laws were dramatically reformed and most mandatory penalties were eliminated.
    - In 2019, the proportion of prisoners serving for drug offenses was 8.3%.

- Historically Michigan had a generous good time system for all but life sentences. The amount of credit awarded increased with the number of years served. A 40-year sentence could be served in 16 years.
    - Good time was eliminated by a ballot initiative in 1978.
    - In 1982 it was replaced by disciplinary credits of up to seven days a month.
    - In 1998, in the guise of "truth in sentencing," all credits were eliminated and people sentenced since then must serve 100% of their minimums.

Sentencing Guidelines History

In April 1978, the Michigan State Court Administrative Office established the Michigan Felony Sentencing Project (MFSP). The staff analyzed about felony sentences imposed in Michigan in 1977. Random sampling was done in a manner that ensured a sufficient number of cases for analysis by crime type and geographic region. The MFSP published its report, *Sentencing in Michigan,* in July 1979, [1] This extremely thorough analysis and the resulting recommendations laid the groundwork for how Michigan's sentencing scheme has evolved ever since.

The MFSP Report identified three core problems: disparity, lack of accountability and the diffusion of authority over the actual sentence to be served among prosecutors, judges and parole boards. Based on the empirical research, the MSFP Steering and Policy Committee said the Legislature should establish a broad-based and racially balanced sentencing guidelines commission to develop and promulgate guidelines. Until the Legislature acted, the Committee urged the Michigan Supreme Court to appoint its own guidelines commission. The Committee assumed a commission would monitor the use and effectiveness of its guidelines on a regular basis.

The SCt appointed a small group of judges to develop advisory guidelines. Many of the policy decisions reflected in Michigan's current guidelines had their origins in that group's work.

- 1983 – first judicial guidelines adopted. Michigan Supreme Court decides *People v Coles* – allows for review of sentence length on appeal but standard is "shocks the conscience of the appellate court."
- 1988 – 2nd ed of judicial guidelines adopted
- 1990 – Michigan Supreme Court decides *People v Milbourn*. Replaces the *Coles* standard with "proportionality" review, using the sentencing guidelines as a touchstone.
- 1994 – Legislature establishes a guidelines commission with a cross-section of stakeholders. The commission's charge includes:
    - public protection,
    - reserving the most severe penalties for crimes of violence against people,
    - identifying cases where non-prison sanctions are appropriate,
    - accounting for state and local correctional resources,
    - making sentences proportionate to the seriousness of the offense and the offender's prior criminal record, and
    - ensuring that offenders with similar offense and offender characteristics receive substantially similar sentences.

[1] Marvin Zalman, Charles W. Ostrum, Jr., Phillip Guiliams, Garret Peaslee, *Sentencing in Michigan: Report of the Michigan Felony Sentencing Project* (Lansing, MI, July 1979).

- 1997 – Commission's proposed guidelines submitted to legislature for approval. Commission never meets again.
- 1998 – Legislature enacts guidelines and makes compliance mandatory, with departures permitted only for substantial and compelling reasons.
- 2002 – Commission's enabling legislation is formally repealed. Myriad subsequent changes to guidelines are adopted by legislature as well as 1) 25-year mandatory minimum sentences for selected habitual offenders and for CSC 1 with a child under 13 and 2) numerous new laws allowing or requiring consecutive sentences.[2]
- 2014 – Legislature creates Criminal Justice Policy Commission (CJPC) to evaluate the operation of the guidelines and recommend modifications to more effectively meet the Legislature's stated goals.
    - MCL 769. 33a also permitted the commission to recommend changes "to any law, administrative rule, or policy that affects sentencing or the use and length of incarceration."
    - It specified ten policies that recommended modifications were to reflect, emphasizing such values as proportionality, equity, consistency, utilizing least restrictive means, the rational use of resources, reliance on research, transparency and the exercise of "judicial discretion to individualize sentences within a framework of law."
    - Overall, the statute laid out the Legislature's broad vision for an integrated scheme of sentencing and corrections that would reduce reliance on incarceration to the extent that is conducive with public safety.
- 2015 – Michigan Supreme Court decides in *People v Lockridge* that, to conform with U.S. Supreme Court mandates, Michigan guidelines are to be advisory only. While the guidelines must be scored and considered, the standard on review will be whether the sentence is reasonable, not whether it conformed to the guidelines recommendation.
- 2019 – The sunset provision on the CJPC is not extended and the commission is allowed to die without finishing its work.

Parole Basics

The Michigan Parole Board has complete discretion to release someone at any point after they have served their minimum sentence up to their maximum sentence. The Board's statutory mandate says that to grant parole the Board must have "reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." Prisoners used to have the statutory right to appeal decisions denying parole to the courts. That right was eliminated in 1998, although prosecutors and victims may still appeal decisions to grant parole.

The board was formerly comprised of corrections professionals who had civil service protection. In 1992 legislation was enacted that dictates the composition of the board by profession and experience. Members are appointed for four-year terms by the MDOC director, who is herself

[2] For an excellent summary of the changes that occurred see Anne Yantus, Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform, 47 University of Michigan Journal of Law Reform 645 (Spring 2014).

appointed by the Governor. Except for lifer paroles, which require a majority of the X member board, decisions are made by panels of three.

In 1992 the Legislature directed the MDOC to adopt parole guidelines. MCL 791.233e assumes that people who score "high probability of release" should be paroled unless there are "substantial and compelling reasons" for denial. For many years the board interpreted "substantial and compelling" so broadly as to give the phrase little meaning. Recent legislation intended to define the phrase more concretely applies prospectively.

From March 2020-Feb. 2021, the overall parole grant rate was 51%.

- 44.3% of those considered scored high probability on the parole guidelines. Their grant rate was 61.9%.
- 48.7% scored average probability. Their grant rate was 46.3%
- 7.0% scored low probability. Their grant rate was 14.8%.

Of those not granted, half were denied release as a "risk to the community" and half had their decisions deferred, most often because of a delay in completing required psychological evaluations. The guidelines are not applied to parolable lifers. The factors scored include offense and prior record characteristics already scored in the sentencing guidelines.

Shifts in the grant rate over the decades have been clearly tied to the philosophy of the board members and of the governor. Under the old civil service board there was a working presumption that people should be released after serving their minimum sentence unless they had poor institutional records or posed a danger to the community. In 1997 there was a very publicly touted policy of denying release to people who were serving for serious assaultive crimes, no matter how long they had already served or how positive their institutional history was. The board decided that their sentences weren't long enough and effectively resentenced them. This attitude contributed to steady growth in the prisoner population for well over a decade.

The current board is less punitive and more interested in evidence-based practices. It has been releasing more parolable lifers, working with contractors to find appropriate placements for prisoners who are mentally ill, revising parole violation policies so that fewer people are returned to prison for technical violations and supporting re-entry programming. The overall rate of returns to prison after three years for both technical violations and new crimes has dropped dramatically, from 42% of those released in 2001 to 26.7% of those released in 2016. This is attributable to a mixture of changed revocation policies, lower crime rates and increased support for reentry.

Faced with a growing population of aging people serving non-parolable life or very long minimum sentences who are medically frail, the MDOC supported a bill that permits medical paroles and nursing home placements. However the Legislature gutted the bill's effectiveness by eliminating from eligibility anyone convicted of first-degree murder or first-degree criminal sexual conduct.

Sentencing Guidelines Characteristics

Michigan's guidelines are complex. There are nine separate grids. Except for second-degree murder, which has its own, the grids roughly reflect the statutory maximum sentence as opposed to the nature of the crime. Thus a variety of person, property and drug crimes that carry a 15-year maximum are all on the C grid. The recommended minimum sentences increase from grid to grid as the maximum sentences they reflect get longer.

Seven prior record variables are scored for all offenses. There are 20 offense variables that address details of the crime, such as the defendant's role, victim vulnerability, weapons use, extent of injury. All the offense variables do not apply to all crimes. Because judicial fact-finding may be needed to score the offense variables, the Michigan Supreme Court found that mandating compliance with the guidelines violates the right to jury trial.

The intersection of the offense and prior record scores determines the applicable cell on the grid. The cell contains a range of months within which the court is supposed to select the minimum sentence. Each cell also contains a side bar that increases the high end of the range by 25, 50 or 100% if the prosecution has chosen to file a habitual offender enhancement alleging the defendant is a second, third or fourth offender, respectively. The court has complete discretion to choose a sentence within the recommended range. It may also choose to depart above or below the range. Departures must be justified by reasons placed on the record but, since *Lockridge*, the reasons no longer need be "substantial and compelling" as long as the resulting sentence is "reasonable."

The guidelines are a product of 1990s penal philosophies. They were deliberately structured to reduce incarceration for less serious offenses and to lengthen sentences for serious assaultive crimes. They include cells that require community sanctions in lieu of prison, straddle cells in which judges have discretion to use prison or not, and presumptive prison cells.

MI's guidelines incorporate a number of critical policy choices that allow for the imposition of extremely long sentences and contribute to disparity. For instance:

- To preserve judicial discretion, on the M2 (murder) and A (life or any term) grids, the cell ranges are extremely broad – commonly as much as 90 months but also 150 or 180 months, allowing defendants who are in the same guidelines cell because they have similar prior record and offense severity scores to receive minimum sentences that differ by seven, twelve or 15 years.
- They employ "real offense" sentencing which allows for the scoring of conduct that did not result in conviction, including conduct that was never charged or underlay charges that were negotiated down.
- They award prior record points for convictions that are concurrent with or subsequent to the conviction for the sentencing offense.
- They allow for double-counting. For instance:
    - The same prior convictions can be scored in the prior record variables, the offense variables and used as the basis for a habitual offender enhancement.
    - Points can be awarded under separate offense variables for aggravated use of a weapon and the lethal potential of the weapon even if use of a weapon is an

element of the offense and the defendant is also receiving a consecutive sentence for felony firearm.
    - Many points are scored for the intent to kill when the offense is murder, attempted murder or assault with intent to murder.
- There is no scoring of mitigating factors.

In its 2014 report, the Council of State Governments found that:

- Michigan's cell ranges are far broader than other guidelines states,
- Guidelines sentences are "all over the map,"
- Application of the guidelines results in disparity,
- The use of habitual offender enhancements by prosecutors is selective but increasing,
- Prison sentences have been growing longer.[3]

The National Center for State Courts found that in 2004 departure rates were very low for sentences on the grids for less serious offenses where lower statutory maximums leave less room for choice. But for the M2, A and B grids (murder, life or any term, 20-year maximum) over 40% of sentences were departures, primarily downward.[4] More recent data confirm this trend.

Michigan Strengths and Weaknesses

Michigan has done a number of things that have helped reduce its prison population and make the criminal justice system more effective.

- More low level offenders are being diverted to community programs, including problem-solving courts.
- Drug crime penalties have been revised downward.
- Treatment program requirements for prisoners were revamped to reflect actual need, as opposed to the conviction offense, reducing a backlog of prisoners who were denied parole because they could not get into programs.
- Prisoner access to academic and vocational programs is gradually being increased.
- Progressive sanctions for probation and parole violations have been adopted.
- The age of criminal responsibility has finally been raised from 17 to 18.
- A recent package of "clean slate" bills will dramatically increase the expungement of prior convictions that hamper employability and residential stability.
- The ability of successor sentencing judges to veto lifer paroles was eliminated.

The most obvious weakness of Michigan's guidelines system is the lack of a commission to oversee it.

[3] Justice Center, The Council of State Governments, REPORT TECHNICAL APPENDIX: Compilation of Michigan Sentencing and Justice Reinvestment Analyses (May 2014), www.csgjusticecenter.org. at 29.

[4] Brian J. Ostrom, Charles W. Ostrom, Roger A. Hanson and Matthew Kleiman, "Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States," National Institute of Justice (2003-IJ-CX-1015), May 2008. A short summary of the findings was published under the same title in Aug. 2008.

- In the more than two decades since they were implemented, the impact of the guidelines overall, the extent to which projected outcomes have occurred and the consequences of the policy decisions described above have not been systematically assessed.
- The return to ad hoc legislative amendments of the penal code and of the guidelines themselves has allowed for inconsistencies to flourish, for choices that undermine the guidelines' goals to go unaddressed and for the relationship of the guidelines to other sentencing and parole policies to go unexamined.
- Ironically, without a commission to do the research, it is not yet known how the change from mandatory to advisory guidelines has affected sentence lengths and compliance rates.

In addition to the specific sentencing guidelines choices outlined above, Michigan needs to broadly reconsider fundamental criminal justice issues, such as:

- The scope of judicial and parole board discretion, i.e., how much they should be constrained and by what methods, and how they should interrelate,
- The extent to which the prosecution can dictate guidelines scoring through habitual, offender enhancements and the multiplication of charges arising from a single incident,
- How important it is to reduce disparity among similarly situated defendants,
- The actual data about recidivism rates and the utility of extremely long sentences.
- The utility of mandatory minimum sentences, including the mandatory penalty for felony firearm.
- Whether the sentencing guidelines should be restructured so that they can be made mandatory without constitutional infirmity.
- Whether the parole guidelines should reflect only the actual likelihood of risk to the public, not the likelihood that the board would grant release.
- Whether probation and parole violators should ever go to prison for conduct that is not a crime and does not pose a risk to public safety,
- Whether incarcerated people should receive positive incentives, like sentence reduction credits, for good conduct and program participation.

There is nothing inherently good or bad about indeterminate sentencing or the retention of parole. If Michigan were to adopt an altogether different scheme, it would still have to address the same fundamental policy issues. If those policy choices are thoughtfully made, various systems of structured sentencing can be tailored to implement them.

Exhibit G

Susan Burton, A New Way of Life

My name is Susan Burton, Founder & President of A New Way of Life Reentry Project (ANWOL). At ANWOL, we provide holistic services and advance multi-dimensional solutions for women who are transitioning out of prisons and jails. These services include:

- Housing
- Family Reunification
- Leadership Development
- Legal Support
- Advocacy

These comprehensive services ensure that women have an opportunity for successful reentry, work to restore the rights of formerly incarcerated people, and mobilize formerly incarcerated people as advocates for social change and personal transformation. Everything we do is driven by our mission to provide a space for formerly incarcerated women to belong, heal, and become leaders in their communities.

I Started ANWOL in 1997 due to my own struggle of being caught in the cycle of incarceration. My substance use led me to be incarcerated on six different occasions. Never once did I receive the proper support needed to successfully return to my community. No one recognized that I didn't have a problem of criminality, but instead suffered from a problem of grief and a history of trauma, further triggered by the accidental killing of my 5-year-old son by a LAPD detective. After his death, my world collapsed, sending me into a dark depression. Without support, I turned to drugs and alcohol which led to nearly 20 years revolving in and out of jail. During my incarceration I prayed I would get into Harbour Area Halfway House (HAHH), the only halfway house in Los Angeles at the time—but despite being eligible, I was never selected.

Ironically, in 2018 I received a call from the President of the Board of HAHH asking us to assume responsibility for the house. Prior to our call, HAHH operated under and was fully funded by the California Department of Corrections and Rehabilitation (CDCR). In 2018, when HAHH became a part of ANWOL, we stopped all funds affiliated with CDCR in order the shift the culture of the house into one where women could heal from the effects of incarceration and fulfill their own desires. Under our care, HAHH experienced a dramatic shift in philosophy and implementation of reentry support. Consistent with the majority of organizations operated by corrections authorities, residents had described HAHH as an extension of prison due to heavy monitoring and little to no personal agency. In contrast, autonomy is a key component in our model, as we believe in providing women with the necessary tools for empowerment and flourishing. ANWOL's approach to reentry is holistic, much different from corrections. The corrections system was designed to contain, control, and oppress people's natural instincts to succeed. We believe community—and not corrections—should be at the front of all reentry services.

Exhibit H

Doug Bond, Amity Foundation

Brief Written Statement for
California Committee on Revision of the Penal Code

Doug Bond, Amity Foundation

- We believe the State can safely reduce its prison population by expanding an existing CDCR residential reentry program, which has proven to reduce recidivism and at less cost than traditional incarceration and parole.

- The Male Community Reentry Program (MCRP) and Custody to Community Transitional Reentry Program (CCTRP) (women's program) currently provide community-based housing and services to 1,000 CDCR inmates at program sites throughout the state. The program was originally established under Penal Code §§ 6250(a), 6258, in accord with federal court orders in *Plata / Coleman*.

- We believe the MCRP / CCTRP programs can be expanded to support 3,000 inmates by 2023 and over 10,000 inmates within five to ten years. In total, over 30,000 prisoners are released from CDCR annually. In the long run, we believe virtually all returning inmates should receive this type of intensive, gradual, community based reentry support. CDCR should transition to increasingly rely on these facilities and look to close traditional prisons.

- According to CDCR, recidivism rates for MCRP / CCTRP participants is significantly better than all other released prisoners. The program currently costs $125 to $175 per inmate, per day. The programs are staffed primarily by nonprofit service providers with on-site security and supervision by CDCR staff.

- Program participants are prisoners in the final year or two of their sentences who agree to leave their traditional prison facility and enter one of the MCRP / CCTR facilities. Participants remain prisoners under CDCR jurisdiction. They wear electronic ankle bracelets, participate in rehabilitation programs, work, and are randomly drug tested. They are also permitted family visits and other benefits of slowly integrating to the community.

July 2021

Exhibit I

Matthew Cate, Cate Consulting

CATE CONSULTING

CALIFORNIA REENTRY WHITEPAPER

Problems to solve: Housing inmates in crowded, outdated, remote prison facilities with inadequate and poorly-designed space for rehabilitative programming, behavioral healthcare and medical services, with little or no opportunity for meaningful connection with their family and communities, has resulted in poor recidivism rates at maximum cost. As a result, more than 32,000 inmates a year are released onto the streets of California and most are inadequately prepared, destined to commit a new crime within three years and be returned to the same broken system.

1. Crowded Facilities
    a. Institutional crowding has been reduced significantly from the high of 163,000 in 2006 to 117,000 currently due to implementation of realignment, Propositions 47 and 57, but still stands at 130% of design-bed capacity.
2. Outdated Facilities
    a. Designed for safety and security, rather than rehabilitation, even at one person per cell (100% of capacity), facilities lack modern treatment and programming space – except where added and retrofitted at great expense.
    b. As a result of traditional design, deferred maintenance and aging, the sights, sounds and smells routinely experienced by inmates and staff provide a poor therapeutic environment.
    c. Most prisons are located in remote areas, making family/community connections difficult.
3. Three-judge panel lawsuit ongoing - pending a durable solution to population issues.
    a. Underlying Plata and Coleman class-actions difficult to resolve in crowded conditions and with inadequate treatment space.
4. Costs continue to rise: Now over $81,000 per year – a 38% increase over costs of $49,000 in fiscal year ’10-11.
5. Due to the factors described above, it is extremely difficult for CDCR to treat many inmates for their most severe criminogenic needs prior to release. For example, 62% of inmates released in ’17-18 had none of their cognitive-behavioral treatment needs met and less than 50% of inmates with a moderate or severe need for substance use disorder treatment complete a SUDT program while in prison.
6. CDCR releases 32,000 inmates a year from traditional prisons. For most of these inmates, the Department provides $200 in gate money, which the inmate has to often use to purchase their release clothing and a bus ticket back to their home county. Once they are dropped off at the bus station, they are expected to find their way to a parole office. As one would expect, many of these inmates end up unemployed, homeless and addicted. The majority reoffend within three years.

Potential Solution: Expand and improve the current Male Community Reentry Program and the Custody to Community Transitional Reenty Program (for females). These programs are designed to allow inmates to serve their last 12-15 months of incarceration in their home communities (longer for females). Inmates

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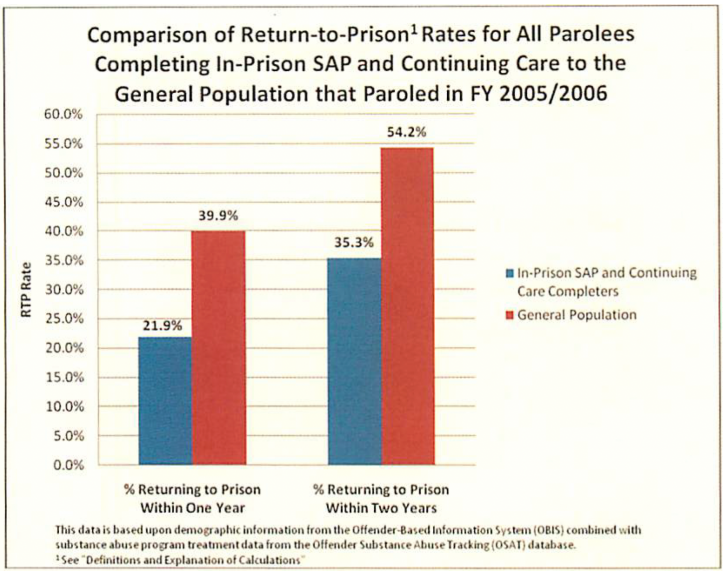
receive rehabilitative services, behavioral health programs and academic/vocational education in smaller, well-designed, local facilities. Participants typically transition from locked to unlocked settings as they demonstrate ability to meet program requirements. Once in the unlocked portion of the program, participants receive assistance in meeting their parole supervision requirements – gainful employment, aftercare programs, establishing medical and behavioral health treatment providers, and locating permanent housing options. Local law enforcement and treatment providers are given information on all participants upon entering the program allowing for a safe and effective reentry process. All of this ideally occurs in the individual's home county, allowing for rebuilding healthy relationships with their families and communities.

Opportunities and challenges associated with the expansion of MCRP/CCTRP

1. As noted above, CDCR releases over 30,000 inmates a year to California's 58 counties, yet there the current capacity of MCRP/CCTRP is limited to approximately 1,050 slots. Providers have indicated an ability to grow their programs to 2,500 slots or more in fiscal year '19-'20 and perhaps 5,000 by '20-'21.
2. It will be a significant challenge for the providers to find appropriately zoned housing for a large number of participants.
3. Currently, the cost of the program is approximately $125 per inmate, per day or $45,000 per year. To grow the program as described above would, therefore, cost $36.5 million, minus the marginal costs of keeping these inmates in existing prisons. Once the program expands, the reduction in population will allow the state to return the inmates currently held in the private out-of-state prisons (achieving the full savings of the contract rate) and, eventually, close or repurpose an existing prison – resulting in significant savings.
4. Historically, the combination of immersive in-prison programs, combined with community- based aftercare has showed a significant impact on recidivism. Accordingly, it is critical that the department prioritize placement of individuals into the MCRP/CCTRP programs who have already been participating in evidence-based programs while in prison. In other words, these community programs will be most successful as part of "after-care" following the successful completion of in-prison rehabilitative programs, as opposed to as a substitute for in-prison programming. In addition, these programs should be voluntary at the beginning and subject to revocation for failure to follow the MCRP/CCTRP program rules.



5. Initial data indicate that recidivism rates for inmates who take part in the current MCRP/CCTRP is 30-40% lower than the comparable cohort. This is a very promising start, especially because many of the inmates being assigned to the current programs are not receiving in-prison programming and are not being assigned on a voluntary basis.

Improvement Opportunities

1. Presently, the people that take part in the MCRP and CCTRP programs are considered "inmates" even though they are in an unlocked facility for a significant period of the program. As a result of the statutory/regulatory language, DHCS has determined that they are ineligible for Medi-Cal. Providing for private health care has cost the state over $10,000,000 per year. This problem could be addressed through legislative changes to the program, clarifying that the inmates are in an unlocked setting and eligible for Medi-Cal.
2. Additionally, in the event an inmate does not return by curfew time or fails to return to a current MCRP program after work, school or treatment, he/she is deemed to have "escaped" or "walked away." Under CDCR protocols, this event often triggers the deployment of Fugitive Apprehension Teams and media notification. These are unnecessary costs and can give the public the false impression that an inmate has escaped from a locked facility. This problem can be addressed though changes to the Department's Operations Manual and other internal controls. It could also be resolved by classifying these offenders as being on "conditional parole" or a similar designation. The Parole Board could have a role in the selection of participants, thereby providing due process to the inmates and even application of the selection criteria across the state.
3. The currently capacity of the program is only 1,050 beds and most of those beds are located in Los Angeles County. In order to expand the program to 5,000 or 10,000 program slots across California, the state will need to address several issues:

   a. Housing capacity will limit growth in some counties, either because there is a shortage of available housing in those communities or because local governments refuse to provide necessary zoning variances or use-permits.
   b. Potential solutions to this problem might include:
      i. Providing a dependable and sufficient level of funding that allows for CBO's to plan for and invest in long-term housing projects.
      ii. Establishing a revolving fund or other mechanism for the state to assist non-profits with initial capital expenses.
      iii. Utilizing social-impact bonds or pay-for-success models to entice private investment in capital projects and rehabilitative programs.
      iv. Building or remodeling projects on state or local government land.
      v. Converting existing prisons in high density areas into Community Reentry Program facilities, e.g., CRC in Norco.
      vi. Using the 3-judge panel to issue orders eliminating local government zoning authority and other impediments.
4. The program currently lacks an independent third-party evaluator. This issue should be resolved by approaching an academic institution with the project.